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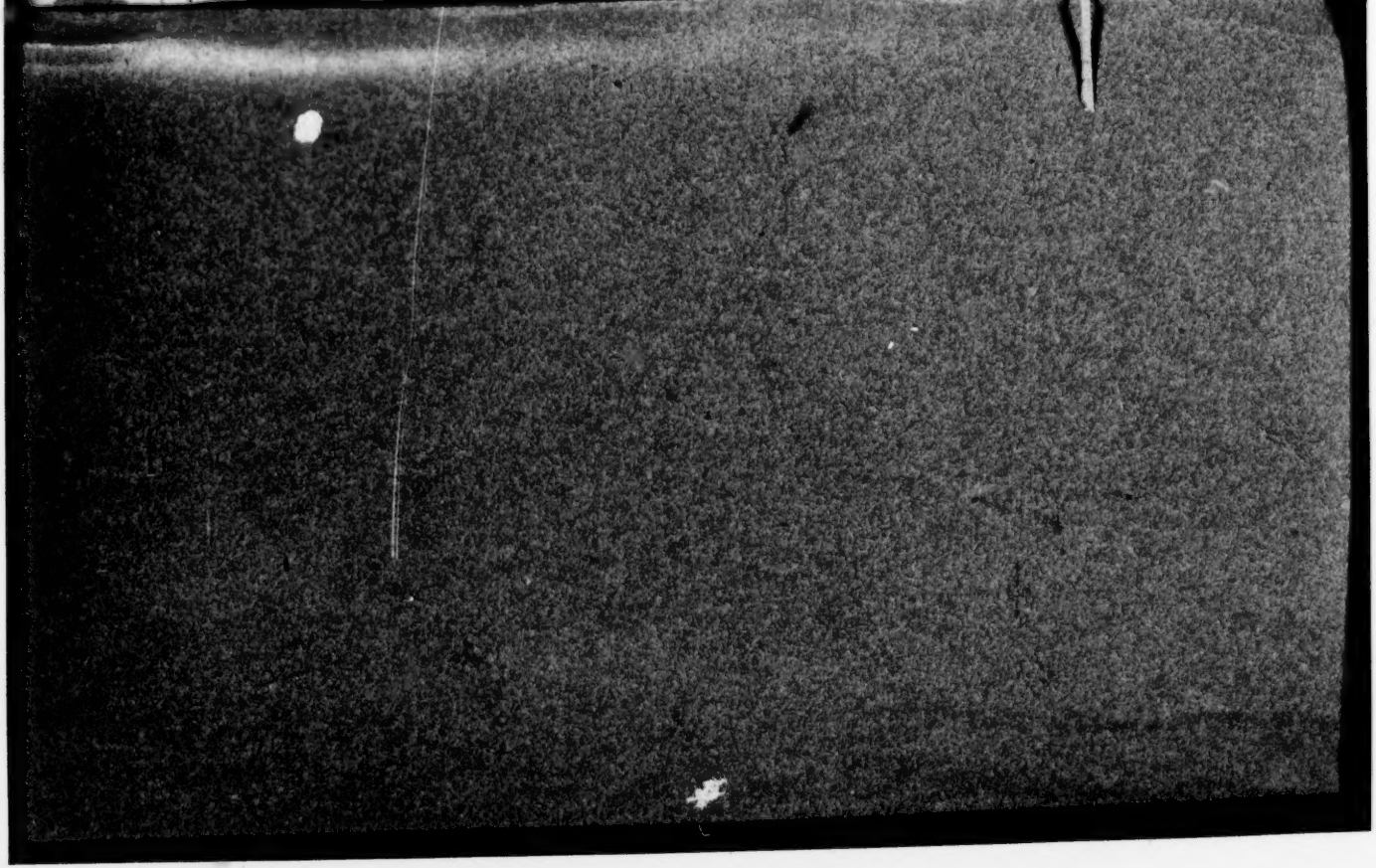

(16,973.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 126.

THOMAS W. HYDE, PLAINTIFF IN ERROR,

vs.

BISHOP IRON COMPANY ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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1 *Citation.*

The President of the United States of America to Bishop Iron Company and Draper, Davis & Hollister, its attorneys; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, and White & McKeon, their attorneys; Frank R. Webber and J. B. Richards, his attorney; Frank W. Forman and Frank B. Forman and Wilson & Vanderlip, their attorneys, and each of you, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, on the 27th day of August, 1898, pursuant to a writ of error filed in the office of the supreme court of the State of Minnesota, wherein Thomas W. Hyde is plaintiff in error and appellant below and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said Thomas W. Hyde, plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles M. Start, chief justice of the supreme court of the State of Minnesota, this 28th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

CHAS. M. START,
Chief Justice of the Supreme Court
of the State of Minnesota.

1½ [Endorsed:] United States of America. In supreme court. Bishop Iron Company, defendant in error; Thomas W. Hyde, plaintiff in error; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, Jouhn P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Foreman, and Frank B. Forman, defendants in error. Citation. Rec'd copy of within citation this 28th of July, 1898. Wilson & Van Derlip, att'ys for Formans. Service of this within citation admitted this 30th day of July, 1898. White & McKeon, F. White, attorneys for defendants in error, Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharpe, John P. Johnson, and N. J. Miller. Service by copy admitted July 30, 1898. Draper, Davis & Hollister, att'ys for Bishop Iron Company. Service of within citation admitted this 4th day of August, 1898. J. B. Richards, att'y for Frank R. Webber.

2 *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Minnesota and to the clerk thereof, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Minnesota, before you or some of you, being the highest

court of law or equity of the said State in which a decision could be had in the said suit between Bishop Iron Company, defendant in error, and Thomas W. Hyde, plaintiff in error; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the question was in favor of such *of* their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest

3 error hath happened, to the great damage of the said Thomas W. Hyde, as by his answer and counter-claim appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 27th day of August, 1898, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 28th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

Seal U. S. Circuit Court, Dist of Minnesota, Third Division.

HENRY D. LANG,
Clerk of the United States Circuit Court
for the District of Minnesota.

3½ [Endorsed:] United States of America. In supreme court. Bishop Iron Co., defendant in error; Thomas W. Hyde, plaintiff in error; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, defendants in error. Writ of error.

4 UNITED STATES OF AMERICA,
State of Minnesota.

In Supreme Court.

BISHOP IRON COMPANY, Plaintiff and Respondent,
vs.
THOMAS W. HYDE, Defendant and Appellant; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, Defendants and Respondents.

Petition for Writ of Error.

And now comes Thomas W. Hyde, the above-named appellant and plaintiff in error herein, and says that on or about the 3rd day of May, 1898, this court entered judgment herein in favor of Bishop Iron Company, the plaintiff above named, and Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, defendants and respondents above named, and against this plaintiff in error, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this plaintiff in error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff in error prays that a writ of error may issue in this behalf to the United States Supreme Court for the correction of errors so complained of, and that a transcript of the record and proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court.

JOHN JENSWOLD, JR., AND
JOHN BRENNAN,
Attorneys for Thomas W. Hyde.

5 On consideration of the foregoing petition the prayer thereof is hereby allowed, and it is hereby ordered that a writ of error issue thereon upon the plaintiff in error, Thomas W. Hyde, giving a bond according to law in the sum of five hundred dollars, for costs, which shall operate as a cost bond simply, and not as a supersedeas bond.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

6 UNITED STATES OF AMERICA, }
State of Minnesota. }

In Supreme Court.

BISHOP IRON COMPANY, Defendant in Error, }
vs.
THOMAS W. HYDE, Plaintiff in Error; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, Defendants in Error. } Assignment of Errors.

I.

Thomas W. Hyde, the plaintiff in error in this action, in connection with his petition for a writ of error, makes the following assignment of errors, which he avers occurred on the trial of the cause, to wit:

1. The court erred in ordering and entering judgment in favor of The Bishop Iron Company, one of the defendants in error herein, and against the said Hyde, in this:

The facts set forth in said amended answer and counter-claim and admitted to be true by the reply of the said Bishop Iron Company show that the said Thomas W. Hyde, by his settlement, improvements, and residence upon the lands in controversy and his cultivation of the same and his application to file thereon and the filing of said application, and his contest of the Warren script selection and location, and his motion to cancel the same, and the prosecution of his rights to said lands before the Department of the Interior, as in said amended answer and counter-claim specifically set forth, acquired a right to be preferred in the acquisition
7 of said lands from the United States and by virtue thereof became, was, and now is the equitable owner thereof, and that but for the erroneous, illegal, mistaken, and unwarranted rulings and decisions of the Honorable Secretaries of the Interior and the Honorable Commissioner of the Land Office the patent to said lands would, prior to the issuing of the same to the said Warren, as of right it should, have issued to the plaintiff in error, and that judgment should have been entered in his favor.

2. The court erred in finding that the Bishop Iron Company was the owner in fee of any part of the premises in controversy, for the reason that the facts set forth in the amended answer and counter-claim of the said Hyde and admitted to be true by the reply thereto show that he, the said Hyde, is the equitable owner of said premises, and that the said Bishop Iron Company holds nothing but the naked legal title to $\frac{1}{2}\frac{3}{5}$ thereof in trust for him.

3. The court erred in finding that the Bishop Iron Company was the lessee of $\frac{1}{2}\frac{3}{5}$ of said lands from the owners thereof, for the facts set forth in the amended answer and counter-claim of the said Hyde and admitted to be true by said reply show that he, the said

Hyde, was and is the equitable owner of said lands, and that the lessors of the Bishop Iron Company held nothing but the naked legal title to $\frac{1}{2}\frac{2}{5}$ of said land, subject to the rights of the said Hyde thereto.

4. The court erred in finding that the said Hyde was in the wrongful possession of said premises and has no title to or
8 interest therein, for it appears from the facts set forth in the amended answer and counter-claim of the said Hyde and admitted to be true by the reply thereto that he, the said Hyde, is the equitable owner of said lands and, as such, has been ever since 1884 and now is in the actual, open, exclusive, and rightful possession thereof.

5. The court erred in sustaining the demurrer of Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, N. J. Miller, and John P. Johnson, part of the defendants in error herein, to the amended answer and counter-claim of the said Thomas W. Hyde in this: the facts set forth in said amended answer and counter-claim, and which are admitted to be true by said demurrer, show that the said Hyde is the equitable owner of said lands, and that any right, title, or interest therein which each or all of said defendants may have or hold jointly or separately they each and all have and hold in trust for said Hyde.

6. The court erred in sustaining the demurrer of Frank W. Forman and Frank B. Forman, two of the defendants in error herein, to the amended answer and counter-claim of the said Hyde, for the reason that the facts set forth in said amended answer and counter-claim, and admitted to be true by said demurrer, show that the said Hyde is the equitable owner of the lands in controversy, and that any right, title, or interest therein which said defendants in error or either of them have or hold they have and hold in trust for said Hyde.

7. The court erred in sustaining the demurrer of Frank R. Webber, one of the defendants in error herein, to the amended answer and counter-claim of the said Hyde, it appearing from the
9 facts set forth in said amended answer and counter-claim, which are admitted to be true by said demurrer, that the said Hyde is the equitable owner of said land, and that any right, title, or interest which the said defendant in error has or holds in or to said lands he holds in trust for the said Hyde.

8. The court erred in ordering and entering judgment in favor of Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, N. J. Miller, John P. Johnson, Frank R. Webber, Frank W. Forman, and Frank B. Forman, defendants in error herein, on the amended answer and counter-claim of the said Hyde and the demurrers of the said defendants in error thereto "barring and estopping him, the said Hyde, from having or claiming any right, title, or interest, estate or property in or to any part of the said described lands adverse to said defendants" in error, in this: the facts set forth in said amended answer and counter-claim, all of which are admitted to be true by said demurrers, show that the said Hyde was and is the equitable owner of said lands.

9. The court erred in denying the motion of the said Hyde to set aside and vacate the court's findings, decision, and order for judgment herein and for a new trial, in this: (*a*) that the facts set forth in the amended answer and counter-claim of the said Hyde, which are admitted to be true by the reply of the Bishop Iron Company and the demurrers of the other defendants in error herein, show that the said Hyde is the equitable owner of the said lands, and whatever right, title, or interest which the defendants in error have or hold
10 in and to said land they and each of them hold the same in trust for the said Hyde; (*b*) that said findings, decision, and order are contrary to *to* the facts as admitted by the pleadings herein; (*c*) that said findings, decision, and order are contrary to law; (*d*) that the court erred in sustaining the said demurrers to the amended answer and counter-claim of the said Hyde.

II.

The plaintiff in error further says that in the record and proceedings in the above-entitled action there is manifest error in this, to wit:

1. It was error for the court to hold that the Secretary of the Interior had a right to consider the testimony in reference to the contract of Hyde and McDonald with their attorney taken in the case of McDonald *vs.* Eaton *et al.*, for the reason that the Secretary in considering the same acted in violation and in disregard of law and the usual and regular rules of practice of the department, and there was no such issue in said case.

2. It was error for the court not to consider the fact that the Secretary of the Interior made a mistake in reference to the testimony of the said Hyde given in the case of McDonald *vs.* Easton *et al.*

3. It was error for the court to hold that the Secretary of the Interior could properly find that an illegal contract had been made in reference to said lands, for the reason that said testimony properly read did not and does not show that he, said Hyde, ever
11 made an illegal contract in reference thereto.

4. It was error for the court to hold that the Secretary of the Interior could consider and properly did consider the testimony in reference to said contract taken upon the hearing of the said case of McDonald *vs.* Eaton *et al.* in considering the said case of Hyde *vs.* Eaton *et al.*, for the reason that said testimony was not received in the Hyde case; the only testimony in the McDonald case which was stipulated into the Hyde case was that bearing upon the legality of the location of the Sioux half-breed script No. 19 D, which was the only issue in said case.

5. It was error for the court to hold that the Commissioner of the General Land Office properly dismissed the said Hyde contest against the said Warren script selection or location, for the reason that said Commissioner had no power or authority to dismiss the said contest without notice to the said Hyde, and the decision of the Secretary, upon which he based his action, was erroneous, unlawful, and unwarranted, and made in another case in which the

question was not at issue and to which the said Hyde was not a party on incompetent, irrelevant, and mistaken testimony.

6. It was error for the court to hold that the "McDonald contest was ordered upon charges made to the Commissioner by both McDonald and the defendant" (the said Hyde), because such is not the fact as alleged in the answer of the said Hyde.

7. It was error for the court to hold that in the said McDonald contest and the contest of the said Hyde against the said scrip locations they voluntarily litigated the question as to their respective pre-emption rights, for the reason that said holding was contrary to the fact as alleged in said answer.

12

8. It was error for the court to hold that when the decision of the Secretary was made in the said contests against the Sioux half-breed scrip locations the rights of the said McDonald and of the said Hyde as pre-emptors were before him, for the reason that it is alleged in the said answer of said Hyde that said McDonald at said time had exhausted his pre-emption right, and the application of the said Hyde to file his declaratory statement on lots five and six and the S. E. ¼ of the N. W. ¼ of the said section 30 had been rejected by the Commissioner of the General Land Office on the ground that it did not antedate said Sioux half-breed scrip location No. 19 D, and no appeal had been taken therefrom, and for the further reason that the said Secretary did not decide that the rights of the said McDonald and of the said Hyde as pre-emptors were before him, but that he by virtue of his supervisory power could on incompetent, irrelevant, and immaterial testimony taken in another case before him act in a case which was not before him; which ruling was erroneous and unlawful.

9. It was error for the court to hold that the respective contests of the said McDonald and of the said Hyde "were initiated and prosecuted by the said McDonald and the defendant (the said Hyde) jointly," for the reason that it is alleged in the answer that they were initiated and prosecuted separately.

13

10. It was error for the court to hold that the said testimony in reference to the said contract was in both cases the respective contests of the said McDonald and of the said Hyde against the said Sioux half-breed scrip locations without objection or reservation.

Wherefore the plaintiff in error prays that the judgment of the said State court be reversed, and that he have judgment decreeing him to be the equitable owner of said lands and requiring the defendants in error to convey the same unto him, and for such other and further relief as may be just and for costs.

JOHN JENSWOLD, JR., AND
JOHN BRENNAN,
Attorneys for Plaintiff in Error.

14 UNITED STATES OF AMERICA, }
State of Minnesota. }

In Supreme Court.

BISHOP IRON COMPANY, Plaintiff and Respondent,
vs.
THOMAS W. HYDE, Defendant and Appellant; FRED F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, Defendants and Respondents. } Order.

This 28th day of July, 1898, came Thomas W. Hyde, plaintiff in error, by his attorneys, and filed herein and presented to the court his petition praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Supreme Court, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error upon the plaintiff in error, Thomas W. Hyde, giving bond according to law in the sum of five hundred dollars for costs, which shall operate as a cost bond simply and not as a supersedeas bond.

Witnesseth the Honorable Charles M. Start, chief justice of the supreme court of the State of Minnesota, this 28th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

15 UNITED STATES OF AMERICA, }
State of Minnesota. }

In Supreme Court.

BISHOP IRON COMPANY, Plaintiff and Respondent,
vs.
THOMAS W. HYDE, Defendant and Appellant; FRED F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, Defendants and Respondents.

Know all men by these presents that we, Thomas W. Hyde, as principal, and John G. Brown and Byron G. Segog, as sureties, are held and firmly bound unto The Bishop Iron Company, the plaintiff above named, and to Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, defendants above named, in the full and just sum of five hundred dollars ($500), to be paid to the said Bishop Iron Company and the defendants last above named, their certain attorneys, executors,

administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of July, in the year of our Lord one thousand eight hundred and ninety-eight.

16 Whereas at the April, 1898, term in the supreme court of the State of Minnesota, in a suit pending in said court between Bishop Iron Company, plaintiff and respondent, and Thomas W. Hyde, appellant; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, defendants and respondents, a judgment was entered against the said Thomas W. Hyde, and the said Thomas W. Hyde having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Bishop Iron Company and the said Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, citing and admonishing them and each of them to be and appear at a session of the United States Supreme Court, to be holden at the city of Washington, on the 27th day of August, 1898:

Now, the condition of the above obligation is such that if the said Thomas W. Hyde shall prosecute said writ of error to effect and answer all costs if he fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

THOMAS W. HYDE.
BYRON G. SEGOG.
JOHN G. BROWN.

Sealed and delivered in presence of—

J. D. ENSIGN.
A. H. CRASSWELLER.

Approved by—

CHAS. M. START,
Chief Justice of the Supreme Court of Minnesota.

17 STATE OF MINNESOTA, } ss:
County of St. Louis, }

On the 14th day of July, A. D. 1898, before me, a notary public in and for said county, personally appeared Thomas W. Hyde, John C. Brown, and Byron G. Segog, to me known to be the persons described in and who executed the foregoing and within instrument, and acknowledged that they executed the same for their free act and deed.

[SEAL.] A. H. CRASSWELLER,
Notary Public, St. Louis Co., Minn.

STATE OF MINNESOTA, } ss:
County of St. Louis, }

Byron G. Segog and John G. Brown, being duly sworn, upon oath each for himself says that he is a resident and freeholder of the county of St. Louis and State of Minnesota and one of the sureties who signed the undertaking hereto annexed; that he is worth the sum of $500 in property within said State over and above his debts and liabilities and exclusive of property exempt from execution.

BYRON G. SEGOG.
JOHN G. BROWN.

Subscribed and sworn to before me this 14th day of July, A. D. 1898.

A. H. CRASSWELLER,
[SEAL.] *Notary Public, St. Louis County, Minn.*

17½ STATE OF MINNESOTA:

In Supreme Court, October Term, 1897.

BISHOP IRON COMPANY, Plaintiff, }
vs.
THOMAS HYDE, Defendant. }

Paper book.

Jno. Jenswold & John Brennan, attorneys for defendant.

18 STATE OF MINNESOTA:

In Supreme Court, October Term, 1897.

STATE OF MINNESOTA, }
County of St. Louis. }

District Court, Eleventh Judicial District.

BISHOP IRON COMPANY, Plaintiff, }
vs.
THOMAS HYDE, Defendant. }

Complaint.

Plaintiff for complaint and for cause of action alleges:

1. That plaintiff is, and during all the times hereinafter mentioned, has been a corporation lawfully organized and doing business under the laws of the State of Minnesota, and in said name as its corporate name.

19 2. That on the 27th day of December, 1894, plaintiff was, and ever since then has been and now is the absolute owner in fee simple, and entitled to the immediate possession of the undivided $\frac{1}{2}\frac{3}{5}$ of the following-described land situated in the county of St. Louis and State of Minnesota, that is to say: The N. E. ¼ of the S. W. ¼ of section 30, township 63 north, range 11 west of the 4th

P. M. in Minnesota, and that on the 27th day of December, 1894, plaintiff was and ever since has been and now is the lessee of the remaining undivided $\frac{12}{25}$ of said land under a lease in writing from and executed by the owners in fee-simple of said remaining undivided $\frac{12}{25}$, under and by the terms of which lease plaintiff was on the said 27th day of December, 1894, and ever since has been, and until the expiration of the full term of thirty years from March 6th, A. D. 1889, will continue to be lawfully entitled to the immediate, sole and exclusive possession of said undivided $\frac{12}{25}$ of said land not owned in fee-simple by plaintiff.

3. That on the 1st day of January, 1895, the said defendant wrongfully and unlawfully entered into and took possession of said land and every part thereof, and has ever since then wrongfully and unlawfully kept and held possession of all said land.

4. That on the 7th day of February, 1895, plaintiff demanded of defendant by a written demand then and in said county duly served upon, delivered to and left with said defendant, possession of
20 the above-described land, which demand defendant refused, and ever since then has refused, and that defendant still continues to unlawfully and wrongfully remain in actual possession of said land.

Wherefore, plaintiff demands judgment:

1. For the possession of said land.
2. For the costs and disbursements of this action.

DRAPER, DAVIS & HOLLISTER,
Attorneys for Plaintiff.

(Duly verified March 29th, 1895.)

(Endorsed thereupon:) "Filed in my office on this 3rd day of April, A. D. 1895. John Owen, clerk district court, by F. R. Miller, deputy."

(Title same as above.)

Motion for Order Bringing in Additional Parties Defendants.

Comes now the above-named defendant and moves the court for an order requiring that Fred F. Huntress, Samuel C. Brown, Frank R. Webber, Wm. C. Sherwood, Joseph H. Sharp, Christian Kortgard, Henry A. Smith, Herbert W. Coffin, A. L. Warner, John P.
21 Johnson, N. J. Miller and Frank W. Forman, appear and answer the cross-petition or counter-claim of defendant in this case as provided by statute, for the several reasons set forth in the affidavit hereto attached and pleadings on file herein, and for the further reason that they are necessary parties herein in order to have a full and just determination of this action.

JOHN JENSWOLD, JR.,
Attorney for Defendant Hyde, 306 Palladio Bldg., Duluth, Minn.

(Title same as above.)

Order for Bringing in Additional Parties Defendants.

Whereas the above-entitled action is an ordinary action in ejectment, brought by the above-named plaintiff against said defendant Hyde to recover the possession of the following premises situated in St. Louis county, Minnesota, to wit: The northeast quarter of the southwest quarter (N. E. ¼ of the S. W. ¼) of section No. thirty (30) in township No. sixty-three (63) north of range No. eleven (11) west of the 4th P. M.; and

Whereas, in said action a summons therein by which the same was commenced was dated on the 30th day of March, 1895, and was duly served upon the defendant Thomas W. Hyde on
22 the 1st day of April, 1895, which said summons was in due and legal form as required by statute, and required said defendant to answer the complaint therein within twenty days after date of service of said summons, and in case of failure thereof the plaintiff would apply to the court for the relief demanded in said complaint; and,

Whereas, said defendant Hyde has appeared in said court and served and filed his answer and a cross-petition or counter-claim against the said plaintiff and the several parties herein named, praying that he be decreed and adjudged the owner of the aforesaid premises, and for general equitable relief.

Now, therefore, the court being fully advised in the premises, upon motion of the said defendant Hyde, it is hereby

Ordered: That Fred F. Huntress, Samuel C. Brown, Frank R. Webber, Wm. C. Sherwood, Joseph H. Sharp, Christian Kortgard, Henry A. Smith, Herbert W. Coffin, A. L. Warner, John P. Johnson, N. J. Miller, Frank W. Forman, are each and all of them made parties defendants in the above-entitled action, and they and each of them are hereby required to appear and answer the said cross-petition or counter-claim of the said Hyde within twenty days after the service of this order upon said party or parties, exclusive of the day of such service, and in default thereof, that the judgment and relief demanded in said cross-petition or counter-claim
23 will be rendered against each and all of said defaulting parties in all respects as though the said party or parties had originally been made a party defendant and duly served with summons in this action.

It is further ordered: That this order be forthwith served upon the said several parties in the manner required by law for the service of a summons in a civil action.

Dated this 17th day of June, A. D. 1895.

By the court:

S. H. MOER,
District Judge.

(Title same as above.)

Amended Answer and Cross-petition.

Comes now the defendant and for an amended answer to the complaint of the plaintiff in this action alleges and shows to the court:

I.

1. He denies each and every allegation in said complaint of the plaintiff not hereinafter admitted to be true.

2. He specifically denies that the plaintiff is the owner of any part of said lands and likewise denies that it is entitled to the possession of any part thereof.

24 3. He admits that on or about the 7th day of February, 1895, the plaintiff demanded of him possession of the lands mentioned and described in the complaint herein and he then and ever since has refused, and now refuses, to deliver possession thereof to the plaintiff.

4. The defendant specifically denies that he ever wrongfully or unlawfully entered upon or took possession of said lands or any part thereof and alleges that he did, on or about the 20th day of August, 1884, peaceably and lawfully enter upon said lands and has ever since been and now is in the peaceable and lawful possession thereof.

5. The defendant admits that the plaintiff is a corporation, organized under the laws of the State of Minnesota.

II.

For further amended answer and by way of counter-claim against the plaintiff and *Fred F. Huntress, Samuel C. Brown, Frank R. Webber*, Wm. C. Sherwood, *Joseph H. Sharp*, Christian Kortgard, Henry A. Smith, Herbert W. Coffin, A. L. Warner, John P. Johnson, N. J. Miller, Frank W. Forman, Frank B. Forman, the defendant Hyde says:

1. That plaintiff The Bishop Iron Company, is now and during all the times herein stated has been a corporation duly created and organized under and by virtue of the laws of the State of Minnesota under which it was incorporated.

25 2. That defendant is now and ever since August 20th, 1894, has been in the actual, open exclusive possession of the northeast quarter of the southwest quarter of section thirty (30) in township No. 63, N. range No. 11 west, of 4th P. M., said lands being located in St. Louis county, Minnesota, and during all of said time has claimed the ownership thereof.

3. That plaintiff, and the several other parties mentioned in this counter-claim, claim some right, title and interest in and to said lands, adverse to the defendant, but said claims are without legal right or authority.

4. Defendant further alleges that on the 20th day of August, 1884, the northeast quarter (¼) of the southwest quarter (¼) of sec-

tion number thirty (30) in township number sixty-three (63) north of range number eleven (11) west of the 4th principal meridian in the county of St. Louis and State of Minnesota was vacant, unoccupied and unsurveyed lands to which the Indian title had been extinguished and belonged to the United States subject to the right of pre-emption.

5. That thereafter and prior to July 20th, 1885, the township in which said lands were and are situated and said lands were duly surveyed and the approved plat thereof was on or about said day duly filed in the lands office at Duluth, Minnesota, that being the land office in the district in which said lands were and are now situated.

26 6. That on or about the 20th day of August, 1884, the defendant was then and there and during all the time herein mentioned has been a qualified pre-emptor, whereupon on said date he settled upon said lands with the *bona fide* intention of acquiring title thereto under the pre-emption laws of the United States and immediately thereafter erected and constructed a dwelling-house thereon, cleared part thereof and cultivated the same and commenced to reside thereon and has ever since resided upon and cultivated and now resides upon and cultivates said lands, and during all said time has been and now is in the actual, open, notorious and exclusive possession thereof.

7. That when defendant commenced his residence on said land as aforesaid, on account of the same not being surveyed and the plat thereof not being filed in the land office at Duluth or elsewhere, he was unable to file on the same. That on the 20th day of July, 1885, said land being then and there subject to the right of pre-emption and after the plat of survey of said land had been filed the defendant went thereto, and in good faith, for the purpose of acquiring title thereto, duly offered and made application to file his pre-emption declaratory statement for said lands and lots 5 and 6 and southeast quarter of northwest quarter (S. E. ¼ of N. W. ¼) of said section thirty (30), and tendered to the receiver of said land office the fees required by law to be paid on such applications and filings;

27 that the local land officers of said land office received said application and informed the defendant that they would reject said application unless limited to said northeast quarter of the southwest quarter (N. E. ¼ of the S. W. ¼) of said section thirty (30); that the defendant then and there informed the said local land officers that his house and the land he had cultivated was upon said northeast quarter of the southwest quarter (N. E. ¼ of S. W. ¼) of said section thirty (30) and that he desired and intended to claim the same as a pre-emption whether or not he was successful in his contest which he then had, and which was pending against the location of the Sioux half-breed scrip No. 19 E upon said lots 5 and 6 and the southeast quarter of the northwest quarter (S. E. ¼ of N. W. ¼) of said section thirty (30); that the said land officers retained said application and informed the defendant that if he was a settler in good faith, that by what he had done his rights were as fully protected as they could be under the rules governing the disposition of public

lands. That on the said 20th day of July, 1885, but what time on said date the defendant is unable to state, the register of said land office endorsed upon his said application to file on said land the following:

"LAND OFFICE, DULUTH, MINN., *July* 20, 1885.

The within application to file D. S. on the within-described land is refused as to the S. E. ¼ of N. W. ¼ and lots 5 and 6, sec. 30, T. 63, R. 11 W., for the reason that the date of settlement alleged
28 herein does not antedate the unadjusted location of Sioux half-breed scrip No. 19 E in the name of Orile Moreau, filed for location June 16, 1883. Said unadjusted scrip location having withdrawn said land from settlement under the pre-emption law subsequent to said date of filing said scrip, to wit, June 16, 1883.

You are allowed 30 days for appeal and are advised that if you fail to do so within that time this decision will be final.

G. G. HARTLEY, *Register*."

That thereafter on the 20th day of August, 1885, the said land officers having retained said application, endorsed thereon the following, to wit: "Filed Aug. 20, 1885."

That the defendant did not know that said endorsements were made on said application and did not learn that they had been made until the 25th day of November, 1895, when he ascertained for the first time by the examination of a certified copy of said application obtained from the General Land Office that they had been made.

8. That thereafter and within the time allowed by law before August 20th, 1885, the defendant not knowing that the said endorsement made July 20th, 1885, on said application had been made, and relying upon what said land officers told him and supposing his application had entirely been rejected, appealed from their
29 decision unto the honorable Commissioner of the General Land Office, which appeal was by said local land officers on the 20th day of August, 1885, duly transmitted to the General Land Office at Washington, D. C.

9. That thereafter, to wit, on the 15th day of October, 1885, one Joseph H. Sharp, pretending and claiming to be the attorney-in-fact of one James H. Warren, an alleged mixed blood of the Chippewas of Lake Superior, to whom a certificate of identity, unlawfully and without authority was issued by the honorable Commissioner of Indian Affairs on the 22nd day of January, 1875, under the 7th clause of the 2nd section of the treaty between the Chippewa Indians of Lake Superior and Mississippi and the United States, made and concluded at La Pointe on the 30th day of September, 1854, unlawfully and without authority selected and located in the name of the said Warren said northeast quarter of the southwest quarter (N. E. ¼ of S. W. ¼) of said section thirty (30); that no notice of the filing of the said scrip was given to the defendant and that he did not know the same was filed until on or about the 10th day of April, 1886.

Defendant alleges on information and belief that the said Joseph H, Sharp was not the attorney-in-fact of the said James H. Warren,

and that the said Sharp was agent for the owner of said certificate of identity, to whom the said Warren had sold the same, and that the owner- of said certificate of identity Fred F. Huntress,
30 Samuel C. Brown, and Christian Kortgard were and are the parties for whose benefit said certificate of identity was located and said selection made, and that when said selection was made they each and all of them had notice of the rights of this defendant, and they located said scrip with the intention of defeating the defendant's claim to said land.

10. That thereafter, to wit, on or about the 10th day of April, 1886; and which was as soon as the defendant discovered that said location had been made and allowed for the said Warren by the said Sharp as aforesaid, the defendant duly made and filed in the local land office at Duluth, Minnesota, an application to contest the said selection and location of the said Warren, made by the said Sharp as aforesaid, on the ground of his prior settlement, residence and improvements upon said northeast quarter (¼) of the southwest quarter (¼) of section thirty (30) and the filing of his said application as aforesaid and the said decision of the said local land officers and his appeal as aforesaid and therein stated that he desired and intended to claim and demand his pre-emption right to the said northeast quarter (¼) of the southwest quarter (¼) of section thirty (30) according to his pre-emption filed on July 20th, 1885, whether he would be successful in his said contest against the said Sioux half-breed scrip location or not, and thereupon moved that the said location of the said Warren be cancelled, which application and motion was duly transmitted by said local land officers
31 to the honorable Commissioner of the General Land Office at Washington, D. C. That on the 22nd day of December, 1888, the honorable Commissioner of the General Land Office duly considered the said application of the defendant to contest said Warren location and his motion to cancel the same, and thereupon, by letter "H" of that date directed to the said local land officers, ordered a hearing to determine which had the superior right to said lands, the defendant or the said James H. Warren. That said order was by the honorable Commissioner of the General Land Office transmitted to the local land office at Duluth, Minnesota.

11. The defendant further alleges and shows to the court that on the 16th day of June, 1883, said section 30 being unsurveyed, Orille Moreau, by Frank W. Eaton, her alleged attorney-in-fact, illegally and without authority located Sioux half-breed scrip Nos. 19 D and 19 E on certain lands therein by metes and bounds, which location when the lands were surveyed and the plat thereof filed in said land office, were adjusted by the local land officers in the name of Orille Stram, *née* Moreau, scrip No. 19 D upon lots 3, 5 and 6, and the S. E. ¼ of the N. W. ¼ of said section 30, and scrip 19 E upon lots 1 and 2 and the S. W. ¼ of the N. E. ¼ and the N. W. ¼ of the S. E. ¼ of said section 30.

12. That on the 9th day of October, 1884, the defendant Thomas W. Hyde, filed in the said local land office, an affidavit of
32 contest, duly corroborated, against the said scrip location, made with the said Sioux half-breed scrip No. 19 D, on the

ground that the scripee, the said Orille Stram, *née* Moreau, never made any improvements whatever on said lands, either in person or by agent or attorney and that said lands at the date of the attempted locations were unsurveyed and belonged to that class of land locatable with said scrip after the scripee had made improvements on the same, and in support of his said charge said Hyde also submitted an affidavit of the said scripee in which she denied ever having given, either directly or indirectly, said Frank W. Eaton a power of attorney or any authority of any kind to locate any land with said scrip or to erect buildings and make improvements upon the land located with said scrip.

13. That in refutation of said charges, said Frank W. Eaton filed in said office certain affidavits in support of the legality of said scrip location and also certified copies of two powers of attorney purporting to be executed by the said scripee and her husband and to authorize him to select and locate, and to make the necessary improvements to enable him to locate for her said scrip.

14. That on the 15th day of October, 1884, Angus McDonald duly filed in said office an affidavit of contest duly corroborated against the said location of said scrip No. 19 E on said lots 1 and 2 and the S. W. ¼ of the N. E. ¼ and the N. W. ¼ of the S. E. ¼ of said section 30 on the ground that the said scripee never
33 made any improvements whatever on said land, either in person or by agent or attorney and that said lands, at the date of the attempted location, belonged to that class of lands only locatable with such scrip after the scripee had made improvements thereon.

15. That in support of said charges, the said Angus McDonald also submitted the said affidavit of Orille Stram and the said Frank W. Eaton opposed the allowance of said contest on the same papers and powers of attorney upon which he opposed the said contest of the defendant. That the said applications to contest the said scrip locations of S. H. B. Nos. 19 D and 19 E duly came on for hearing before the Assistant Commissioner of the General Land Office and he, on the 14th day of November, 1885, by letter "C" of that date, a true and correct copy of which is hereto annexed and marked Exhibit "A" ordered a hearing to determine the legality of said scrip locations Nos. 19 D and 19 E.

16. That said order was duly transmitted to the said local land office and on the 17th day of November, 1885, the register and receiver of said land office duly fixed as a day for hearing in each of said cases, the 6th day of April, 1886, and duly issued notice thereof in the case of the said Angus McDonald, a true and correct copy of which is hereto annexed marked Exhibit "B" and made a part hereof, and also at the same time issued a notice of said hearing in the case of the defendant, a true and correct copy of which
34 is hereto annexed, marked Exhibit "C" and made a part hereof.

17. That the foregoing were all the issues made in the aforesaid contests.

18. That the said contest of Angus McDonald came on for hear-

ing pursuant to said notice which was duly served before the register and receiver of the said local land office, and said order and all parties thereto appeared and submitted evidence, and that on said hearing there was erroneously and contrary to law, admitted, taken and received the following irrelevant, incompetent and immaterial testimony of the defendant and of the said Angus McDonald and of S. F. White, to wit:

Testimony of S. F. White.

"S. F. WHITE, being duly sworn upon oath deposes and says: I am one of the attorneys for the contestant; I have made careful search through my safe and among all my papers for the contract of security given me by the *contestants* in these cases to secure me for advances and legal services and I am unable to find it. I supposed until about two or three days before the day set for hearing that it was in the files of the case in my office, but I have looked through that and could not find it and have made a careful search through my safe and among all my papers where I thought it could be, and have continued that search at various times up to this morning when I made a last final search through my safe and have been unable to find it and have no idea where it is."

Testimony of Mr. Hyde.

Q. "Did you have any contract with Mr. White in writing or otherwise by which he was to receive any compensation or interest in the land?

A. Yes, there was a contract.

Q. Where is it?

A. I don't know.

Q. When and where did you see it last?

A. I have not seen it since it was drawn by Mr. White.

Q. What did it contain?

A. It contained when I proved up on the land I was to secure him on a one half interest.

Q. Who witnessed the contract?

A. Powers, McDonald and myself and Mr. White were together; that is all I recollect. I can't say whether Powers witnessed it or not. The last I knew of the contract Mr. White had it. Mr. Powers was not included in the contract with McDonald and myself and White."

Mr. McDonald's Testimony.

"Mr. White has furnished me the supplies to keep me on the claim. I am making the improvements for myself. I don't know of any one being interested in the claim except myself. Judge White has no interest in it. There is an understanding that he is to have an interest in it if we succeed in this trial. He is to have a half interest. I know R. D. Mallett; he has no interest in the claim, he is not going to have any.

The arrangement with Hyde is the same as mine. White is to have half if we succeed in this. James H. Powers is also to have an interest in it if we succeed. I don't know how much he is to get. I agreed to give him an interest if we succeeded in getting the land. Mr. Hyde went after Powers to come and testify in the case. I never had any talk with Mallett about the claim. Mr. White is paying the expenses of the claim with the understanding that he is to have a half of it if we secure it."

Redirect:

Q. The half interest you speak of Mr. White is to have was to be a deed of or security upon a half of the land for advances and services?

A. It was a security.

Q. This interest you have spoken of as to Mr. Powers and which you say you cannot fix the amount of, what was that? Was it not simply that he was to be paid for his time and services and there was no telling how much he would have to put in it?

A. He was to be paid for his time: that is all I mean by an interest he was to have.

Cross-examination:

I am to let him have an interest in the land when I get
37 it to pay him for his time and services. The contract I have with Mr. White for this one-half is in writing.

Q. When you get this land is it not the understanding between you and Mr. White that you are to deed him an undivided one-half interest in it?

A. No, sir; we never mentioned a deed.

Q. What do you mean then by saying that White was to have a half interest?

A. To secure him for advances.

Q. Then if it was to secure him for advances made, how can you give him a half interest unless you deed him one-half?

A. I could not very well.

Q. Then your understanding is you are to deed him one-half interest in it?

A. No; that is not my understanding.

Q. Really you do not know anything about it do you?

A. I know my own transaction about it, but I don't know White's."

19. That no further or other evidence was taken on either of said hearings relative to the said contract, with the said White.

20. That at the conclusion of the taking of testimony on the said hearing in the said contest of Angus McDonald, all the parties to the said contest of the defendant against the said location of scrip No. 19 D, being present at the hearing thereof, made and entered into a stipulation, whereby it was stipulated and agreed that the

testimony in the said McDonald case should be considered
38 in determining the validity of the said location of scrip Nos. 19 D and 19 E, which stipulation was and is as follows:—

"It is hereby stipulated and agreed upon that this testimony (meaning the testimony in the McDonald case) shall be considered in determining the validity of both locations of scrip 19 D and 19 E (meaning the locations hereinbefore mentioned)."

That no testimony or evidence whatsoever, other than that received under said stipulation was taken, admitted, or received on the hearing of the said contest of the defendant against the said location of scrip 19 D, and that was admitted for the purpose, and that only, of determining the validity of said scrip location No. 19 D. That the question as to the validity of said scrip location No. 19 D was the only issue in the said contest of this defendant and that of the said McDonald. That thereupon on the said evidence and stipulation, the said local land officers erroneously and contrary to law, decided and held both of said scrip locations valid.

That from said decision, both the defendant and the said Angus McDonald appealed to the honorable Commissioner of the General Land Office on the grounds:

1st. Because the register and receiver were never authorized or directed to decide said cause.

2d. Because the so-called decision is contrary to the evidence and the facts.

39 3d. Because the so-called decision is contrary to law.

4th. Because the so-called decision treats the case as though the contest was one between the scripee and her attorney, whereas, it grew out of a contest by third parties who claim and have shown that the scrip entry was fraudulent on the part of both the scripee and her grantees.

5th. The local land officers in their so-called decision failed to pass upon the vital question in the case, viz.—whether the land contained improvements made by, or under the personal supervision or direction of the scripee and that they were for her personal use and benefit.

That the said appeals of the defendant and Angus McDonald came on for hearing before the honorable Assistant Commissioner of the General Land Office, and he, on the 4th day of August, 1888, by letter "H" of that date, a true and correct copy of which is hereto annexed, marked "Exhibit D," and made a part hereof, cancelled said scrip locations Nos. 19 D and 19 E on the ground that "the evidence showed conclusively the scripee never saw the land or the improvements, or had anything whatever to do with either," and rejected the defendant's application to file on said lands so far as it related to said lots 5 and 6 and the S. E. ¼ of N. W. ¼ of said section 30.

40 That said Frank W. Eaton appealed from the said decision of August 4th, 1888, unto the honorable Secretary of the Interior, and said appeal came on for hearing before said Secretary (Wm. F. Vilas) and after considering the same, he, on the 18th day

of February, 1889, affirmed said decision, but erroneously and contrary to law, declared said lands open to entry by the first legal applicant.

The defendant further alleges that his said appeal from said rejection of his said application to file as pre-emptor, so far as it related to said lots 5 and 6 and the southeast quarter of the northwest quarter of said section 30, had been determined by the said Commissioner as aforesaid and was not before the said Secretary. That at said time the said McDonald had exhausted his pre-emption right which fact was before said decision brought to the attention of said Secretary (Wm. F. Vilas).

That prior to said decision of Secretary Vilas, no charge was ever made or filed against the right of either the said Hyde or McDonald in either of said cases to file on said lands or any lands as pre-emptors, and on the question of the defendant's good faith in making said application to file on said lands as aforesaid he has never had a hearing or his day in court. That notwithstanding the fact that said McDonald had exhausted his pre-emption right, and that the said appeal of the defendant from the rejection of his said application to file on said lands as a pre-emptor as aforesaid, was not in issue in either of said cases or before said Secretary, and that
41 the defendant never had a hearing on his right to file on said land as a pre-emptor, it was erroneously and contrary to law, determined by the said Secretary that the defendant's said appeal from the rejection of his said application to file on said lands as a pre-emptor, and both the rights of he and McDonald as pre-emptors were in issue and that a hearing had been had thereon, and by mistake as to what the testimony of said Hyde was, on said evidence mistaken, as hereinafter stated, erroneously and contrary to law decided that said testimony showed that it was impossible for the defendant to make the affidavit required by § 2262 of the Revised Statutes of the United States, "that he had not directly or indirectly made any agreement or contract in any way or manner, with any person whatever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefits of any person except himself, and that his application to file should be treated as though it had been filed and that it ought to be cancelled if filed." That the said mistake in reference to said testimony, consisted in misquoting and mistaking the answer of the said Hyde in his testimony, hereinbefore set forth to the question as to what the contract with Mr. White contained. That the said answer to said question as it in fact was and is, is as follows: "It contained that when I proved up on the land I was to secure him *on* a half interest" and it was mistaken and misquoted so as to read—"It contained, that when I proved up I was to secure him a half interest."

42 That thereafter the defendant duly made a motion to review said decision on the ground of said mistake, and that his rights as a pre-emptor were not in issue in said contest, and that it was error for said Secretary to hold that said lands were open to entry by the first legal applicant. And thereafter the same came

on for hearing, and on the 28th day of January, 1891, the honorable Secretary of the Interior (John W. Noble) modified said decision by holding and deciding that the preference right of entry of neither the said Hyde nor McDonald was decided thereby, but erroneously and contrary to law denied said motion in all other respects.

That on the 8th day of March, 1889, and prior to the date of the decision of the said Secretary (John W. Noble) the honorable Commissioner of the General Land Office, without notice to the defendant, erroneously and without warrant and without authority of law, based upon said erroneous, unwarranted, and illegal decision of February 18th, 1889, of the Secretary of the Interior (Wm. F. Vilas), revoked said order of December 22nd, 1888, by which a hearing was ordered, on the application of the defendant to contest and his motion to cancel the said location of the said Warren scrip.

That thereafter, and immediately upon learning that the said order for a hearing had been revoked, the defendant, on or about the 6th day of July, 1889, duly moved to set aside said revoking order of March 6th, 1889, which motion the honorable Com-
43 missioner of the General Land Office unlawfully and wrongfully neglected to pass upon, and same has not been acted upon by him.

That on the 19th day of March, 1889, Emil Hartman filed in said local land office an application to contest the said entry of the said Warren, which was refused, and the said Hartman appealed from said action to the honorable Commissioner of the General Land Office; that on the 23rd day of February, 1889, one Joseph H. Chandler applied to locate Valentine scrip on said lands, which application was rejected by the local land officers for conflict with the said Warren location; that other applications were made to contest said Warren location and enter said lands and rejected by the local land officers and appeals taken therefrom to the honorable Commissioner of the General Land Office; that the appeals of all said parties were considered by the honorable Commissioner of the General Land Office, and he on October 16th, 1889, erroneously and contrary to law held that the said location by the said Warren was valid and affirmed the action of the local land officers in rejecting the said application of the said Chandler and others to enter said lands, and that said affidavit of contest of the said Hartman was first in time as between him, Chandler, and said other parties, and that the same and the affidavits in support thereof did not present sufficient grounds to order a hearing and erroneously and contrary to law failed, refused, and neglected to pass upon the said motion of the
44 defendant to reinstate his said contest against the said Warren scrip location. That from the said decision of the honorable Commissioner of the General Land Office, all parties thereto including the defendant and excepting said Warren, duly appealed to the Secretary of the Interior and by stipulation of counsel for the defendant, the said Hartman and all others interested therein, the said appeals came on for hearing before the honorable Secretary of the Interior on the 19th day of October, 1891, and after considering the same, the honorable Secretary of the Interior on the 31st day of

May, 1892, erroneously and contrary to law, based on the said illegal, unwarranted and erroneous decision of the Secretary of the Interior (Wm. F. Vilas) of February 18th, 1889, decided "that the defendant could claim nothing by virtue of his pre-emption claim to said N. E. ¼ of S. W. ¼ of section 30," and directed the honorable Commissioner to order a hearing upon Hartman's said allegations of contest. That thereafter and in due time, the defendant duly made and filed a motion for review of the said decision of the honorable Secretary of the Interior of May 31st, 1892, based on the following and other assignments of error:

1. Error in passing upon the rights of Hyde as a pre-emption claimant or otherwise, without giving him any hearing whatsoever in this case.

2. Error in holding that as to James H. Warren, and his
45 scrip location, Hyde's right as a pre-emption claimant was *res adjudicata.*

3. Error in utterly disregarding Hyde's claim to the land in question.

4. Error in neglecting and refusing to give Mr. Hyde a hearing upon the merits of his claim in his case.

5. Error in holding that the Warren scrip location, or that the claims of any of the contestants, took priority of, or were superior to the claim of Hyde to this land.

6. Error in utterly and entirely failing to give Hyde his day and hearing in court as against the Warren scrip.

7. Error in holding that what occurred in another case, and between different parties to the record was *res adjudicata* as to the Warren claim in this case.

That thereafter, to wit: on the 12th day of November, 1892, the said Secretary, based on erroneous, illegal and unwarranted decision of Secretary Vilas erroneously and contrary to law, denied said motion.

That thereafter and in accordance with said decision of the honorable Secretary of the Interior, the honorable Commissioner of the General Land Office, ordered a hearing on the said contest of the said Hartman, notice of which was duly given and the same came on to be heard before the said local land officers at Duluth,
46 Minnesota, between the 17th day of January and the 9th day of February, 1893, at which time and place defendant duly appeared and applied to be made a party thereto and be heard and offered evidence in support of his said settlement, residence and improvements upon the said lands, which applications and offers were erroneously and contrary to law rejected and denied by the said local land officers.

That the defendant duly appealed from said action of said local land officers unto the honorable Commissioner of the General Land Office. That said appeal came on for hearing in due time before the said honorable Commissioner, and he, on the 21st day of August, 1893, erroneously and contrary to law, based upon the said decision of Secretary Vilas, decided that the defendant had no standing in said case and that no error was committed by the register and re-

ceiver of the said local land office in refusing to recognize him as a party, or in declining to receive the testimony offered by him. That in due time the defendant duly appealed from the said decision of the said honorable Commissioner, dated August 21st, 1893, unto the honorable Secretary of the Interior. That the said appeal in due time came on for hearing before the Secretary of the Interior and that thereafter, to wit, on the 20th day of July, 1894, the said Secretary, erroneously and contrary to law, based upon the said decision of Secretary Vilas, decided said appeal and affirmed the decision of said honorable Commissioner and directed that
47 the entry of said Warren be held for patenting.

The defendant further alleges and shows to the court, that pursuant to and in accordance with the erroneous and unwarranted decisions of the Secretaries of the Interior and in derrogation of the rights of the defendant on the 22d day of December, 1894, a patent from the United States to said lands, erroneously and without authority of law, issued to the said James H. Warren.

That the defendant by his said settlement, improvements and residence upon the lands in controversy and his cultivation of the same and his said application to file thereon, and the filing of said application as aforesaid *and* the premises, and his said contest of the said Warren location and his said motion to cancel the same and the prosecution of his rights to said land before the Department of the Interior as hereinbefore stated and specifically set forth, acquired a right to be preferred in the acquisition of said lands from the United States and by virtue thereof and of the premises, became, was, and now is, the equitable owner thereof and that but for the said erroneous, illegal and unwarranted rulings and decisions of the honorable Secretaries of the Interior, as aforesaid, the patent to the said lands would long since and prior to the issuing of the same to the said Warren, as of right it should have been issued to the defendant.

The defendant further alleges that each and all of said
48 parties, including the plaintiff, had knowledge and notice of the claims of the defendant prior to the issuing of said patent to the said Warren, and the time they respectively acquired their and each of their alleged interest and of said erroneous, illegal and unwarranted rulings and decisions of the Secretaries of the Interior.

The defendant further alleges that the plaintiff claims to be the owner of an undivided $\frac{1}{2}\frac{3}{8}$ of the fee to said N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of said section 30, and also claims to have a mining lease of the remaining $\frac{1}{2}\frac{2}{8}$ of said lands from parties who claim under the said Warren.

The defendant further alleges on information and belief that Fred F. Huntress, Samuel C. Brown, Frank R. Webber, W. C. Sherwood, Joseph H. Sharp, Christian Kortgard, Henry A. Smith, Herbert W. Coffin, A. L. Warner, John P. Johnson, N. J. Miller, Frank W. Forman, Frank H. Forman, Emil Hartman, Richmond D. Mallett, the Germania Iron Company, a corporation organized under the laws of the State of Minnesota, Andreas M. Miller and Robert

Spencer, each claim to have an interest under the said Warren in the said northeast quarter of the southwest quarter of said section 30, but the nature, character and extent of each and all of said claims the defendant is unable to state with greater particularity and that each and all of said last-mentioned parties are necessary parties to this action and that a complete determination of the controversy herein cannot be had without their presence, and
49 that in the furtherance of justice it is necessary and proper that they be made parties to this action and that by so doing a multiplicity of actions will be avoided.

Wherefore, the defendant prays that the court order that each and all of said parties be made parties to this action and they each and all be required to make and file an answer to the defendants' counter-claim within such time as the court may direct and that the defendant have judgment decreeing that all of said parties may be adjudged to hold the title to said northeast quarter of the southwest quarter of section thirty in township sixty-three north of range eleven west, in the county of St. Louis and State of Minnesota, in trust for the use and benefit of the defendant, and further ordering and decreeing that the title to said lands be divested out of said defendants and vested in the defendant, and for such other and further relief as may be just and equitable.

JOHN JENSWOLD, JR.,
Defendants' Attorney.

JOHN BRENNAN, *Of Counsel.*

(Duly verified.)

50 EXHIBIT "A."

Letter C, Nov. 14th, 1885.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Nov. 14th*, 1885.

Register and receiver, Duluth, Minnesota.

GENTLEMEN: On the 16th of June, 1883, Frank W. Eaton, attorney-in-fact, filed Sioux half-breed scrip No. 19 letters D and E issued to Orille Moreau upon a tract of unsurveyed land described by metes and bounds. It is stated that when this tract of land is officially surveyed the filing made with scrip 19 D will embrace the W. ½ of N. W. ¼ of sec. 29, and the S. E. ¼ of N. E. ¼ and the N. E. ¼ of S. E. ¼ of sec. 30, and the filing made with 19 E will embrace the S. W. ¼ of N. E. ¼ and E. ½ of N. W. ¼ and S. W. ¼ of N. W. ¼ of sec. 30, twp. 63 N. R. 11 W. 4th principal meridian.

On the 31st of October, 1884, the register transmitted the applications of Angus McDonald and Thomas W. Hyde by their attorneys, Messrs. White & Brown, to respectively contest said locations upon the ground that the scripee never made any improvements whatever on said land either in person or by an agent or attorney, and that said land at the date of the attempted location, was unsur-

veyed and belonged to that class of land only locatable with such scrip after the scripee shall have made improvements upon
51 the same. In support of this statement they submitted copy of an affidavit by the scripee in which she states that she never at any time made, constituted or appointed Frank W. Eaton her true and lawful attorney, and that she never at any time either directly or indirectly in any manner gave him any authority to select and locate any lands with said pieces of scrip, or to make any improvements upon the lands in question, or upon any other lands for her use and benefit.

On the contrary said Eaton, through his attorneys Curtiss and Bardett, submitted certain papers in support of the legality of said locations, including certified copies of two powers of attorney executed apparently by said scripee and her husband (original powers on file in this office with location papers) which authorized him to select and locate each piece of said scrip 160 acres of public land and if the land so selected be unsurveyed, to make thereon in her stead and for her personal use and benefit, the improvements necessary to the proper location of the scrip upon unsurveyed land. Mr. Eaton claims, and it so appears from the papers submitted and the locations above referred to, that he, under the authority thus vested in him by said scripee and her husband, made valuable improvements upon the lands in question and located the same with said pieces of scrip in entire good faith and in full compliance with the requirements of the law relating to the location of this class of scrip and the regulations of this office prescribed thereunder.
52 Therefore he requests that the applications of said McDonald and Hyde for a hearing in this matter be rejected.

In view of the conflicting statements respecting the legality of these locations, I deem it proper that a hearing should be had that the respective parties may have an opportunity to submit such proof as they may have in support of their allegations and that this office may be possessed of all the facts possible in the matter, and the same is hereby ordered.

You will notify all parties in interest of the time and place of hearing, and at the proper time thereafter you will transmit to this office the testimony taken thereat with your joint opinion thereon.

Very respectfully, S. M. STOCKSLAGER,
Ass't Commissioner.

EXHIBIT "B."

U. S. LAND OFFICE,
DULUTH, MINN., *Dec. 17th*, 1885.

In the matter of S. H. B. scrip No. 19 letter E, by Frank W. Eaton, the attorney-in-fact of the scripee Orille Moreau, upon lots 1 and 2, southwest quarter of northeast quarter, section 30, township 63 north, range 11 west, on the 21st day of July, 1885, you are hereby advised that upon the allegations of Angus McDonald
53 and Thomas W. Hyde, that the above-named scripee never made any improvements whatever upon west half of north-

west quarter section 29, and southeast quarter of northeast quarter and the northeast quarter of the southeast quarter of section 30, of said township 63, range 11 west, and the allegations of said scripee that she never at any time made, constituted or appointed Frank W. Eaton her true and lawful attorney, or in any manner gave him any authority to select and locate any lands with said piece of scrip, or to make and build improvements on the land in question or upon any land for her use of benefit the honorable Commissioner of the General Land Office, by letter "C" of November 14th, 1885, instructed the register and receiver of the local land office to inquire into and determine the truth of those allegations. Accordingly you are summoned to appear at this office on Tuesday, April 6th, 1886.

G. G. HARTLEY, *Register.*
E. G. SWANSTROM, *Receiver.*

To White & Reynolds, attorneys for Hyde and McDonald and Moreau, Duluth, Minn.

EXHIBIT "C."

U. S. LAND OFFICE,
DULUTH, MINN., *Dec. 17th*, 1885.

54 In the matter of S. H. B. scrip No. 19 letter D, by Frank W. Eaton, the attorney-in-fact of the scripee, Orille Moreau, upon lots 3, 5 and 6, southeast quarter of northwest quarter, section 30, township 63 north, range 11 west, on the 21st day of July, 1885, you are hereby advised that upon the allegations of Thomas W. Hyde and Angus McDonald, that the above-named scripee never made any improvements whatever upon lots 3, 5 and 6, and southeast quarter of northwest quarter of section 30, of said township 63, range 11 west, and the allegations of said scripee that she never at any time made, constituted or appointed Frank W. Eaton her true and lawful attorney, or in any manner gave him any authority to select and locate any lands with said piece of scrip, or to make and build improvements on the land in question or upon any land for her use and benefit, the honorable Commissioner of the General Land Office, by letter "C" of Nov. 14th, 1885, instructed the register and receiver of the local land office to inquire into and determine the truth of those allegations. Accordingly you are summoned to appear at this office on Tuesday, April 6th, 1886.

G. G. HARTLEY, *Register.*
E. G. SWANSTROM, *Receiver.*

To White & Reynolds, attorneys for Hyde and McDonald and Moreau, Duluth, Minn.

55 EXHIBIT "D."

"H."
Doc. 1.—Case 681.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASH., D. C., *Aug.* 4, 1888.

THOMAS W. HYDE and ANGUS MCDONALD
vs.
FRANK W. EATON, Attorney-in-fact for Orille Stram, *née* Moreau.

S. H. B. scrip 19 D and 19 E.

Register and receiver, Duluth, Minn.

GENTLEMEN: I have considered the above-entitled case appealed by the contestants from your decisions in favor of the defendant.

The record shows that June 16th, 1883, Orille Stram *née* Moreau, a Sioux half-breed Indian, by her attorney-in-fact, Frank W. Eaton, filed in the Duluth, Minn., local land office, Sioux half-breed scrip No. 19 D and 19 E, each for 160 acres, dated Nov. 24th, 1856, issued to said Orille Stram *née* Moreau, under the act of July 17, 1854, U. S. States at Large, vol. 10, p. 304, by virtue of which said Eaton located, as such attorney-in-fact for said Stram 320 acres of unsurveyed land, and that on July 21st, 1885, said locations were adjusted by the local land office at Duluth, Minn., and approved and posted by this office Sept. 9th, 1885, to embrace lots 3, 5, 6, and S. E.
56 ¼ N. W. ¼ sec. 30, T. 63 N., range 11 W., as adjusted to the location made under said scrip 19 D, and under scrip location 19 E to embrace lots 1 and 2, and S. W. ¼ N. E. ¼ and N. W. ¼ S. E. ¼ same section.

On July 20th, 1885, Angus McDonald presented a pre-emption application for lot 2, N. ½ S. E. ¼ and S. W. ¼ N. E. ¼ of said section, which you rejected because the N. E. ¼ S. E. ¼ is denominated swamp and overflowed land, and as to the remaining tract so applied for, because the date of settlement alleged in the application does not antedate the unadjusted scrip location No. 19 E. At the same day and date you also rejected a like application presented by Thos. W. Hyde for lots 5 and 6, S. E. ¼ N. W. ¼ and N. E. ¼ S. W. ¼ of the same section, for the reason that the alleged settlement does not antedate the unadjusted scrip location No. 19 D.

On Nov. 14, 1885, upon the application of the contestants in the case, a hearing was ordered by this office on the allegation "that the scripee never made any improvements whatever on said land, either in person or by an agent or attorney and that the said land, at the date of the attempted locations, was unsurveyed and belonged to the class of land only locatable with such scrip after the scripee shall have made improvements upon the same."

And in support of these charges there was submitted a copy of an affidavit made Oct. 9, 1884, by the scripee in which she
57 denied ever having given, either directly or indirectly, said Frank W. Eaton a power of attorney, or any authority of

any kind to locate any land with said scrip, or to erect buildings and make improvements upon the land in controversy, or upon any other land for her use and benefit.

In refutation of such denial by the scripee the defendant's attorney-in-fact filed copies of two powers of attorney given to him, said Eaton, by said scripee and her husband, May 25th, 1883, conferring upon him the necessary power and authority to locate said scrip, and to make the improvements required by said act of July 17th, 1854, upon any land subject to location by said scrip, and to do any other act necessary to be done in the premises, in order to secure a permanent and *bona fide* location, in the same manner as if done by them personally.

A trial was had April 6th, 1886, resulting in a judgment as stated. In their appeals the contestants assign six specifications of error, as follows, to wit: 1st. The register and receiver had no authority to render a decision upon the law or facts in the case. 2nd. Their so-called decision is contrary to the evidence. 3rd. It is contrary to the law. 4th. The so-called decision treats the case as if the controversy was between the scripee and her attorney in-fact. 5th. In the so-called decision, the vital question in the case is not passed upon, namely, whether the land involved contained improvements made by or under the personal supervision or direction of
58 the scripee, and also for her personal use and benefit. And 6th. In finding that a confirmatory deed made between two of the parties to a fraudulent entry of Government land bars the right of subsequent *bona fide* applicants.

Pending the foregoing proceedings Fred L. Huntress filed in the local land office at Duluth, Minn., an application to contest the S. H. B. S. locations made by said Eaton, as attorney-in-fact for the scripee above mentioned.

This application was transmitted by the register May 5th, 1887, to this office for its consideration and action and was returned Nov. 29, 1887, with instructions that it be held subject to the final disposition of the case at bar. Accompanying the said certificates or scrip, and applications to locate the same are what purports to be the original powers of attorney, given by the scripee, and her husband, May 25th, 1883, to said Frank W. Eaton and an affidavit by the latter, with each application, stating that, as such attorney, he caused to be built upon each of the tracts located on as described heretofore, a house 14 by 16 feet, one story high of timber, covered with split shingles, with doors and windows, and has also had cleared ready for cultivation one-half an acre of each tract, and that these improvements were made under the personal direction of said Orille Stram, and for her personal use and benefit under the authority of and by virtue of the said power of attorney. Accompanying the records of the case are what also purports to be the original powers of attorney, given May 25th, 1883, by the
59 said Orille Stram and her husband, to Leonidas Merritt, granting to him full power to enter upon and take possession of any and all pieces or parcels of land in the State of Minnesota, which they then owned, or may hereafter acquire, or become in-

terested in, by virtue of the location of said scrip, to prosecute and defend any suits at law in the courts of said State, and to grant, bargain, sell, demise, lease, convey and confirm said lands, or any part thereof, by deed, conveyance, demise or lease in the same manner as if performed by them individually.

There are also filed with the records, copies (certified) of two warranty deeds, dated July 2, 1883, and executed in the same of said Orille Stram, and her husband Roman Stram, by Leonidas Merritt, under and by virtue of this power of attorney referred to, conveying, for the nominal consideration of $25,000 in each to Edward Bryne, James N. Powers and Joseph Clement, an undivided one-third interest in and to all the land embraced in said scrip location and involved in this controversy. These are also filed in the case, certified copies of two warranty deeds, bearing date July 6th, 1883, executed in the same manner by the same parties of the first part, conveying to Frank W. Eaton of Duluth, Minn., for the nominal consideration in each of $25,000, an undivided (⅔) two-thirds interest in and to the said tracts of land.

On the 28th day of August, 1883, Jos. Clement, one of the grantees above referred to, it appears by certified copies, also filed in
60 evidence, of two deeds of warranty, conveyed to one Nicholas Lastnerf, of Milwaukee, Wisconsin, for the nominal consideration in each of $250, his undivided one-ninth interest in and to said tracts, and the next day, August 29th, 1883, as shown by certified copies filed with the record, James H. Powers executed two similar deeds, conveying to said Lansterf for the nominal consideration of $350 in each, all his undivided one-ninth interest in and to said land.

A certified copy of a quitclaim deed executed Aug. 29, 1894, by Leonidas Merritt, under and by virtue of his power of attorney in the name of Orille Stram and her husband, is filed also in which for the consideration of one dollar they released and quitclaimed to James H. Powers in order to correct an imperfect description contained in the prior warranty deed of July 2, 1883, between said parties of the first part and Edward Byrne, James H. Powers and Joseph Clement, all their interest in and to the undivided one-ninth interest, previously conveyed to said Powers of the N. E. ¼ N. W. ¼, S. ½ N. W. ¼ and the S. W. ¼ of N. E. ¼ of said sec. 30, and the next day Aug. 30, 1884, said Powers released and quitclaimed to said Nicholas Lansterf, for the consideration of one dollar, as shown by a certified copy of a quitclaim deed executed on that day between said parties, in order to correct the misdescription above referred to, all his interest in and to an undivided one ninth interest in the tract last referred to.

61 The 26th of Sept. 1884, as shown by a certified copy of a quitclaim deed filed with the case, the said Orille Stram, her husband, by Leonidas Merritt, under and by virtue of his power of attorney, released and quitclaimed to said Joseph Clement, for the purpose of correcting a misdescription in a warranty deed, dated July, 1883, between said parties of the first part and Edward Byrne, James H. Powers and Joseph Clement, all their interest in and to

the undivided one-ninth interest in the N. E. ¼ N. W. ¼ S. ½ N. W. ¼ and S. W. ¼ N. E. ¼ of said sec. 30. There is no record evidence offered that said Clement ever executed a quitclaim deed of his interest in the last-named tract, as did Powers, of his interest in the same tract, in order to rectify the alleged error in description to said Lansterf.

It will be observed that, as far as the facts presented disclose Powers and Clement each divested himself of his one-ninth interest in both these tracts to Nicholas Lansterf; that Bryne retained his one-ninth interest, and Frank W. Eaton his two-thirds interest, as attorney-in-fact for the scripee, and that up to the trial of this case, as far as the record discloses, such was the state of the several parties named, and their interest in and to any of the land in question.

The several deeds of conveyance and release conferred no greater title upon the grantees than the grantors had, which was simply a right to these tracts of land subject to the final adjudication and approval of these locations.

62 Prior, however, to the trial, the said Orille Stram, and her husband, Roman Stram, on March 31st, 1886, joined in a deed of confirmation, ratifying and confirming all and singular the acts, as attorney-in-fact of the said Frank W. Eaton and Leonidas Merritt, in the premises relating especially to the tracts of land involved in this case.

The evidence related at the hearing, I think, established by a clear preponderance, the fact that, said Eaton by virtue of his power of attorney, employed Edward Byrne, to make the improvements upon the respective tracts in question, and that Byrne secured the services of Powers and Clement to assist him in the matter—Eaton admits that the power of attorney given to him by said scripee was executed in blank, and that he never saw such scripee until March 31st, 1886, never saw the land himself and did not know whether said scripee ever saw it or not, and there is no other evidence on that point. The deed of confirmation above referred to, appears, as far as Eaton and the scripee are concerned, to remove any objection to the former's acts, prior thereto, under and by virtue of his said power of attorney.

The affidavits accompanying the placing of said scrip, appear to fulfil the requirements of the circular of March 26th, 1878.

The contestants herein did not claim settlements under their respective applications, to make pre-emption filings upon

63 those tracts of land, until more than a year after the location of the scrip involved in this case.

They admit, in their testimony, that the improvements placed upon these tracts, the year before, they found in an impaired condition, August 20th, 1884, when they went thereon. The only other question, it appears, that is left for me to pass upon, touching the legality of these locations, since it is upon the charge of their illegality that the case is based, is, whether the power of attorney given to Frank W. Eaton by the scripee, by virtue of which he made the locations, could carry with it under the law, the power and au-

thority as well, to make the improvements required by law. There is evidence sufficient to raise suspicion of bad faith, between some of the parties herein, having an alleged interest in the result of this suit, but it in nowise affects any interest of the Government.

The law expressly prohibits assignments of S. H. B. S. No provision is made, in express terms, in the act authorizing the issue of said scrip, for the location of it by attorney, "upon any of the unsurveyed lands, not reserved by Government, upon which they (grantees of said scrip) have respectively made improvements," but a general power to so locate it, appears to be implied, and to have been uniformly acted upon by the department.

64 The Government is not called upon to adjudicate questions in cases, except where it is an interested party. The legality of these locations in issue in this case, and as in the case of Allen *et al. vs.* Merrill *et al.*, decided by the Commissioner Dec. 2, 1887, and reported in 14 Copp. L. C., 243, the evidence shows conclusively that the scripee never saw the land, or the improvements or had anything whatever to do with either.

The circular referred to requires that the Indian shall have a direct connection with the land and claim the same for his personal use. Following the ruling in the case above cited, I must reverse your decision and hold said locations for cancellation, subject to the right of appeal.

Advise the parties accordingly.

Respectfully,

T. J. ANDERSON,
Assistant Commissioner.

Filed in my office December 4th, 1895.

JOHN OWENS,
Clerk of District Court,
By W. A. KENNEDY, *Deputy.*

BISHOP IRON COMPANY, Plaintiff,
vs.
THOMAS W. HYDE ET AL., Defendants.

Demurrer.

65 Plaintiff demurs to that part of the amended answer and cross-petition of the defendant set forth in subdivision 2 of said amended answer and cross-petition containing new matter pleaded as a counter-claim, on the ground that the facts therein stated do not, upon their face, constitute a defense.

DRAPER, DAVIS & HOLLISTER,
Attorneys for Plaintiff.

Filed Dec. 17, 1895.

(Title same as above.)

Demurrer.

The defendants Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson and N. J. Miller demur

to the counter-claim of the defendant, Thomas Hyde, and for cause of demurrer allege the following reasons:

1. The said alleged counter-claim does not state, set forth or allege any cause of counter-claim against the plaintiff or any cause of action against these defendants or against any one of them.

2. The said alleged counter-claim shows by its allegations that said defendant Hyde has no right or title to, and has no interest in, the land described in the complaint and claimed by him in
66 his alleged counter-claim, and therefore that he has no cause of action against these defendants, or any one of them therefor.

Wherefore, these defendants demand that they may be hence dismissed and that they may have judgment for their costs and disbursements against said defendant.

WHITE & McKEON,
Attorneys for Huntress, Brown, Smith, Johnson, Sharp, and Miller.

Filed July 1st, 1895.

(Title same as above.)

Order.

This cause came on to be heard on a demurrer of the plaintiff and the defendants Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph Sharp, N. J. Miller, and John P. Johnson, to the amended answer and counter claim of the defendant Hyde, and was heard by the court on the 7th day of December, 1895, Messrs. Draper, Davis & Hollister appearing for the plaintiff, John Jenswold, Jr., Esq., appearing for the defendant Hyde, and Messrs. White & McKeon appearing for the other defendants above named, whereupon on mature deliberation it is considered by the court that the said demurrer should be sustained.

67 Thereupon it is ordered and adjudged that said demurrers be, and the same are hereby, sustained.

Dated at Duluth, Minn., this 10th day of December, A. D. 1895.

S. H. MOER,
District Judge.

(Filed December 10th, 1895.)

(Title same as above.)

Demurrer of Defendants Forman.

The defendants, Forman, hereby separately demur to the cross-petition in the above-entitled action, upon the ground-,

1st. That the court has no jurisdiction of the subject of the action.

2nd. That the cross-petition does not state facts sufficient to constitute a cause of action.

WILSON & VAN DERLIP,
Attorneys for Defendants Forman.

(Title same as above.)

Demurrer.

Defendant Frank R. Webber, appearing herein by his attorney, J. B. Richards, demurs to the answer of the defendant Thomas
68 W. Hyde on the grounds as follows, viz: That the same does not set forth any facts sufficient to constitute a defense to the cause of action set up in the complaint of the plaintiff, and asks that judgment may follow according to the prayer of the complaint, and that defendant Webber have judgment for his costs and disbursements against said defendant Hyde.

Dated July 10th, 1895.

J. B. RICHARDS,
Attorney for Defendant Webber, 301 *Burrows Bdg., Duluth; Res.*, 522 *W. 5th St.*

(Title same as above.)

Order Sustaining Demurrer.

This cause came on to be heard on the demurrers of the defendants Frank R. Webber, Frank W. Forman and Frank B. Forman, to the amended answer and counter-claim of the defendant Hyde at the special term of this court held on the 19th day of September, A. D. 1896, Jno. Jenswold, Jr. appearing for the defendant Hyde, and Messrs. Wilson & Van Derlip appearing for the defendants Frank W. Forman and Frank B. Forman, and J. B. Richards, Esq., appearing for Frank R. Webber; after argument by the respective attorneys and due consideration by the court, it is,

69 Ordered, that said several demurrers be and the same are hereby sustained.

Dated September 19th, A. D. 1896.

By the court:

C. L. BROWN,
District Judge, Acting.

Reply.

(Title same as above.)

The plaintiff, for reply to the amended answer of Thomas W. Hyde, denies each and every allegation in the first subdivision of said amended answer, constituting the first four folios of said answer, except such facts as are alleged in plaintiff's complaint.

Wherefore, plaintiff demands judgment as in its complaint.

DRAPER, DAVIS & HOLLISTER,
Attorneys for Plaintiff.

(Duly verified and filed Oct. 3, 1896.)

Findings of Facts, &c.

(Title same as above.)

The above-entitled cause having been brought on to be
70 heard upon pleadings and proofs, at the November, 1896, term of this court, Draper, Davis & Hollister appearing for the plaintiff, and John Jenswold appearing for the defendant, and the court, having duly considered the same, finds the following facts:

Findings of Fact.

1. That plaintiff was on the 27th day of December, 1894, and still is a corporation.

2. That plaintiff, prior to the commencement of this action acquired the legal title from the persons owning the same, of an undivided thirteen-twenty-fifths ($\frac{13}{25}$) of the northeast quarter (N. E. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$) of section thirty (30), in township sixty-three (63) north, range eleven (11) west of the 4th P. M. in Minnesota; and also acquired, prior to the commencement of this action, a lease from the persons holding the legal title thereto, of the remaining twelve-twenty-fifths ($\frac{12}{25}$) of said land for a period of thirty (30) years from the fourth day of March, 1889, in and by which lease plaintiff was granted the right to immediately have and possess said twelve-twenty-fifths ($\frac{12}{25}$) interest in said land.

3. That prior to the commencement of this action defendant was in possession of said lands, and possession thereof was demanded of him by plaintiff, which was refused.

4. That those who conveyed said thirteen-twenty-fifths ($\frac{13}{25}$) of said land to plaintiff and leased the remaining twelve-
71 twenty-fifths ($\frac{12}{25}$) thereof to plaintiff, acquired said lands by conveyances executed by the person or persons to whom said premises were patented by the United States of America.

5. That said defendant does not own or hold or claim to own or hold said premses by virtue of any patent of the United States or any other instrument of conveyance executed by any person or persons claiming by, through or under those having the legal title to said lands.

Conclusions of Law.

1. That plaintiff is the owner in fee of an undivided thirteen-twenty-fifths ($\frac{13}{25}$) of said lands, and lessee of the remaining twelve-twenty fifths ($\frac{12}{25}$) of said lands from the owners thereof.

2. That defendant is in the wrongful possession of said premises and has no title to or interest therein.

3. That plaintiff is entitled to the immediate possession of said lands.

4. That plaintiff is entitled to judgment for his costs and disbursements in this action.

Let judgment enter accordingly.

By the court:

J. D. ENSIGN, *Judge.*

Dated December 4th, 1896.

Filed Dec. 4, 1896.

72 *Case or Bill of Exceptions.*

(Title same as above.)

The above entitled cause coming on for trial before the Hon. J. D. Ensign, one of the judges of said court, a jury having been waived, on the 30th day of November, 1896, at a general term of said court held in and for said county, Messrs. Draper, Davis & Hollister appearing as attorneys for the plaintiff, and John Jenswold, Jr., as attorney for the defendant Thomas Hyde, it appearing that the mandate from the supreme court affirming the action of this court sustaining the demurrer to defendant's amended counterclaim is on file herein, whereupon the following evidence was given and proceeding had, to wit:

Plaintiff offered in evidence a patent from the United States to James H. Warren, dated December 26th, A. D. 1894, and recorded January 4th, A. D. 1895, in Book 99 of Deeds on page 390 of the deed records of St. Louis county, Minnesota, to which offer the defendant Hyde duly objected as incompetent, immaterial and irrelevant, and for the further reasons that the same was issued without authority and was void for the reasons and upon the grounds set forth in said defendant's counter-claim herein.

Said objection was overruled, to which ruling said defendant duly excepted.

73 Said patent is in due and legal form and purports to have been issued by the proper authority and to convey the land in controversy herein.

Plaintiff also offered in evidence duly executed and acknowledged deeds of conveyances from the said Warren and wife, and mesne conveyances and instruments which upon their face conveyed and vested the title which said Warren by said patent obtained, in the plaintiff herein as follows, to wit: As absolute owner in fee-simple, an undivided thirteen-twenty-fifths of said land, and as the sole and exclusive lessee to hold for the full term of thirty years from March 6th, A. D. 1889, an undivided thirteen-twenty-fifths of said land.

To each of these offers the defendant Hyde duly objected as incompetent, immaterial and irrelevant, which objections were each overruled and to which several rulings said defendant duly excepted.

Certificate.

The foregoing case or bill of exceptions having been examined by the undersigned, the judge who tried the said cause, and having

been found conformable to the truth, is hereby allowed and signed as the settled case or bill of exceptions, and a part of the record herein, and the same as settled contains all the proceedings had upon the trial of said cause, together with all objections, rulings, exceptions and admissions of the parties, the evidence offered and that given therein.

74 Dated this 19th day of December, A. D. 1896.

By the court:

J. D. ENSIGN,
District Judge.

(Filed Dec. 19, 1896.)

Notice.

To Messrs. Draper, Davis & Hollister, attorneys for the plaintiff herein:

Please take notice, that the foregoing is the proposed case or bill of exceptions which the defendant Hyde will present to the judge of said court, and ask to be signed, settled and allowed as the settled case or bill of exceptions herein.

Dated December 15th, A. D. 1896.

JNO. JENSWOLD, JR.,
Attorney for Defendant Hyde.

(Filed Dec. 17, 1896.)

Stipulation.

It is hereby stipulated and agreed that the foregoing shall be signed, settled and allowed as the settled case or bill of exceptions herein, and that the plaintiff's motion for a new trial herein be heard by the court at a special term thereof to be held on

75 December 19th, A. D. 1896, without notice as required by the statutes and rules of this court.

DRAPER, DAVIS & HOLLISTER,
Attorneys for Plaintiff.

JNO. JENSWOLD, JR.,
Attorney for Defendant Hyde.

(Filed Dec. 17, 1896.)

Motion for New Trial.

(Title same as above.)

Comes now the defendant Hyde in the above-entitled cause and moves the court for an order vacating and setting aside its findings decision and order herein, and that it grant a new trial for the following causes materially affecting his substantial rights, to wit:

1st. That said findings, report and decision is not justified by the evidence.

2nd. That the same is contrary to law.

3rd. Errors in law occurring at the trial and excepted to by the fendan I yde.

4th. The order of the court herein sustaining the demurrer to the defendant Hyde's amended and substituted counter-claim herein.

JNO. JENSWOLD &
JOHN BRENNAN,
Attorneys for Defendant Hyde, No. 306 Palladio Bldg., Duluth, Minn.

(Filed Dec. 17, 1896.)

76 *Order.*

(Title same as above.)

The motion of the defendant Hyde made herein for an order setting aside the findings and decision of the court and order for judgment herein and granting a new trial, having been fully argued by counsel for the respective parties, and the court being fully advised in the premises it is hereby,

Ordered, that the said motion be and the same is hereby denied.

J. D. ENSIGN,
District Judge.

(Dated Dec. 19, A. D. 1896.)

(Title same as above.)

The above-entitled cause having been brought on to be heard upon pleadings and proofs, at the November, 1896, term of this court, Draper, Davis & Hollister appearing for the plaintiff, and John Jenswold, Jr., appearing for the defendant Thomas W. Hyde, and the court having duly considered the same, finds the following facts:

Amended Findings of Fact.

1. That plaintiff was on the 27th day of December, 1894, and still is a corporation.

77 2. That plaintiff prior to the commencement of this action acquired the legal title in fee of an undivided thirteen-twenty-fifths ($\frac{13}{25}$) of the northeast quarter (N. E. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$) of section thirty (30) in township sixty-three (63) north, range eleven (11) west of the 4th P. M. in Minnesota, and is now seized thereof by mesne conveyances from the person to whom the said premises were patented by the United States; and also acquired, prior to the commencement of this action, a lease from the persons holding the legal title in fee thereto, as above stated, of the remaining twelve-twenty-fifths ($\frac{12}{25}$) of said land for a period of thirty (30) years from the fourth day of March, 1889, and by which lease plaintiff was granted and acquired the right to immediately have and possess said twelve-twenty-fifths ($\frac{12}{25}$) interest in said land during all of said thirty years; that defendant Thomas W. Hyde has no title to or interest in said lands or any part thereof.

3. That at and prior to the commencement of this action, defendant Thomas W. Hyde was and still is in the wrongful and unlawful

possession of said lands, without any color of title thereto or interest therein, and possession thereof was demanded of him by plaintiff, which was refused.

4. That those who conveyed said thirteen *twelve* twenty-fifths ($\frac{13}{25}$) of said land to plaintiff and leased the remaining twelve-twenty-fifths ($\frac{12}{25}$) thereof to plaintiff, acquired said lands by
78 conveyances executed by the person or persons to whom said premises were patented by the United States of America.

5. That said defendant Thomas W. Hyde does not own or hold or claim to own or hold said premises by virtue of any patent of the United States or any other instrument of conveyance executed by any person or persons claiming by, through or under those having the legal title to said lands.

Conclusions of Law.

That plaintiff is the owner in fee of an undivided thirteen-twenty-fifths ($\frac{13}{25}$) of said lands, and lessee of the remaining twelve-twenty-fifths ($\frac{12}{25}$) of said lands from the owners thereof.

2. That defendant is in the wrongful possession of said premises and has no title to or interest therein.

3. That plaintiff is entitled to the immediate possession of said lands.

4. That plaintiff is entitled to judgment for its costs and disbursements in this action.

Let judgment enter accordingly.

By the court:

J. D. ENSIGN, *Judge.*

Dated March 13, 1897.
(Filed March 13, 1897.)

79 (Title same as above.)

Judgment.

The above-entitled cause having been duly brought on to be heard and being regularly on the calendar of said court for trial at the November, 1896, general term of said court, Draper, Davis & Hollister appearing as attorneys for plaintiff, and John Jenswold, Jr., appearing as attorney for the defendant Thomas W. Hyde, and the court having heard the evidence, the arguments of counsel, and due consideration having been had, having made and filed findings of fact and conclusions of law and ordered judgment to be entered therein in favor of said plaintiff and against said defendants:

Now therefore, in accordance with and in pursuance of said order for judgment, it is ordered and decreed, that the plaintiff, Bishop Iron Company, is the owner in fee of an undivided thirteen-twenty-fifths ($\frac{13}{25}$) of those certain lands situated in said State of Minnesota, known and described as the northeast quarter (N. E. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$) of section thirty (30) in township sixty-three (63) north, range eleven (11) west of the fourth principal

meridian in Minnesota, and that it, said Bishop Iron Company, is the lessee of the remaining twelve-twenty-fifths ($\frac{12}{25}$) of said lands for a period of thirty (30) years from and after the 4th day of March, 1889.

80 It is further adjudged and decreed that said plaintiff, Bishop Iron Company, is entitled to the immediate possession of all of said lands and every part thereof, and that the defendant Thomas W. Hyde is in the wrongful possession of said premises, and has no title to and no interest in said lands, and no title to or interest in any part thereof.

It is further adjudged and decreed, that plaintiff do have and recover of the said defendant Thomas W. Hyde its costs and disbursements in this action, which have been heretofore taxed and allowed at the sum of thirty and $\frac{95}{100}$ dollars ($30.95), and that plaintiff is entitled to the process of this court to put it in possession of said lands and for the collection of said costs and disbursements.

Witness the Honorable J. D. Ensign, one of the judges of said court, and the seal of said court, at the city of Duluth in said county of St. Louis and State of Minnesota, this 17th day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal of District Court.]

JOHN OWENS, *Clerk*,
By W. J. WEST, *Deputy*.

(Duly filed March 17, 1897.)

(Title same as above.)

Stipulation.

81 It is hereby stipulated by and between the defendants Thomas W. Hyde and Frank W. Forman and Frank B. Forman, by their respective attorneys, that notice of the entry of judgment in the above-entitled action is waived and that the clerk of said court may enter the same upon the records and files herein, the same being subject to all objections thereto except that of notice of such entry.

Dated March 17, 1897.

JOHN JENSWOLD, JR.,
Attorney for Thomas W. Hyde.
MESSRS. WILSON & VAN DERLIP,
Attorneys for Frank W. Forman and Frank B. Forman.

(Filed March 19, 1897.)

The above-entitled action having been duly brought on to be heard upon the demurrer of the defendants Frank W. Forman, Frank B. Forman, Fred F. Huntress, Samuel C. Brown, Frank R. Webber, Henry A. Smith, Joseph A. Sharp, John P. Johnson and N. J. Miller, to the cross-bill interposed and filed by the defendant

Hyde, Messrs. Wilson & Van Derlip and others appearing for said defendants Forman and others and Mr. John Jenswald, Jr., appearing for said defendant Hyde, and the court having heard the arguments of said counsel and having duly considered the same, and having thereafter duly made and filed its order sustaining said demurrer and no appeal from said order having been taken,
82 and the time for appealing therefrom having expired, upon motion of Messrs. Wilson & Van Derlip and others, attorneys for said defendants Forman and others, and in pursuance of the stipulation filed herein in behalf of said defendant Hyde—

It is ordered and decreed, that the defendant Thomas W. Hyde has no right, title, estate, interest or property in or to any of the lands described in the complaint in this action and in his said cross-bill, to wit: the N. E. ¼ of the S. W. ¼ section 30, in township 63, north of range 11 west in St. Louis county, Minnesota, as against the defendants Frank W. Forman, Frank B. Forman, Fred F. Huntress, Samuel C. Brown, Frank R. Webber, Henry A. Smith, Joseph A. Sharp, John P. Johnson and N. J. Miller, and that said Thomas W. Hyde is barred and estopped from having or claiming any right, title, interest, estate or property in or to any part of said described lands adverse to said defendants, Frank W. Forman, Frank B. Forman, Fred F. Huntress, Samuel C. Brown, Frank R. Webber, Henry A. Smith, Joseph A. Sharp, John P. Johnson and N. J. Miller.

Witness the Hon. J. D. Ensign, one of the judges of said court, and the seal of said court at Duluth, in St. Louis county, State of Minnesota, this 19th day of March, 1897.

[Seal of District Court.]

JOHN OWENS, *Clerk*,
By W. J. WEST, *Deputy*.

83 (Title same as above.)

Notice of Appeal.

To Messrs. Draper, Davis & Hollister, attorneys for the plaintiff, The Bishop Iron Company, and to Messrs. Wilson & Van Derlip, attorneys for the defendants Frank B. Forman and Frank W. Forman, and to Messrs. White & McKeon, attorneys for the defendants Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph A. Sharp, John P. Johnson, and N. J. Miller, and to J. B. Richards, Esq., attorney for the defendant Frank R. Webber, and to John Owens, clerk of said district court:

Please take notice that the above-named defendant Thomas W. Hyde appeals to the supreme court of the State of Minnesota, from the judgment of the said district court entered herein, as of dates March 17th, 1897, and March 19th, 1897, in favor of the plaintiff and against the defendant Hyde and in favor of the defendants Frank B. Forman, Frank W. Forman, Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph A. Sharp, John P. Johnson, N. J.

Miller and Frank R. Webber, and against the defendant Thomas W. Hyde, and from the whole thereof.

Dated this 21st day of August, A. D. 1897.

JOHN JENSWOLD, JR.,
Att'y for the Defendant Thomas W. Hyde,
No. 306 Palladio B'ld'g, Duluth, Minn.

84–177 (Duly served on clerk of district court and on all attorneys for all defendants Sept. 8, 1897, and filed Sept. 10th, 1897.)

178 *First Opinion.*

(Supreme Court of Minnesota, July 24, 1896.)

BISHOP IRON CO.
v.
WEBBER ET AL.

Public lands—Pre-emption—Disqualification of claimant—Stipulations—Effect.—A party claiming the right to pre-empt certain Government land filed an application to contest as invalid a prior entry, and the contest was being heard by the local land officers. He then voluntarily stipulated into the hearing certain evidence as to his qualifications and right to make a pre-emption, although that question had not been ordered to be inquired into at the contest; but the Commissioner of the General Land Office and the Secretary of the Interior passed upon the evidence, and held that the party was disqualified to pre-empt the land. Held, that by the stipulation he waived his right to object to a consideration of his qualifications and rights as a pre-emption claimant, and the irregular manner in which the officers of the Land Department proceeded in adjudicating as to such qualifications and rights, and, there being evidence to sustain a finding that he was disqualified and had not a pre-emptor's rights, such finding is conclusive upon him.

(Syllabus by the court.)

Appeal from district court, St. Louis county—S. H. Moer, judge.

Ejectment by the Bishop Iron Company against Frank R. Webber and others. Plaintiff's lessors were made parties defendant at the instance of defendant Thomas Hyde, and from an order vacating the order making them parties and sustaining demurrers to said defendants' answer said defendant appeals. Affirmed.

John Jenswold, Jr., and John Brennan, for appellant; Draper, Davis & Hollister, for respondent; White & McKeon, for defendant, respondents; Billson, Congdon & Dickinson, for defendants.

COLLINS, *J.:*

This was an action of ejectment, plaintiff corporation alleging that it was the owner of $\frac{13}{20}$ of the 40 acres in controversy and lessee

from the owners in fee of the remaining $\frac{2}{5}$, and therefore entitled to the sole and exclusive possession of the entire tract. The
179 answer admitted that defendant was in possession of the tract, and generally denied all other allegations of the complaint. It then set forth an equitable counter-claim at great length and with much detail, from which it appears that in 1894 a patent had been issued for said land to one Warren by the General Government, and that plaintiff's claim to be the owner of an undivided $\frac{3}{5}$ of the 40 was based upon a deed from Warren, while the plaintiff's rights as lessee were predicated upon conveyances, whereby the lessors had succeeded to Warren's title to the remaining $\frac{2}{5}$. It was alleged, with particularity as to the facts, that the patent to Warren was issued erroneously, unlawfully, and in defiance of defendant's right to have the patent issued to him. Judgment was demanded that the title to the land be decreed to be in defendant, and held by plaintiff and the other parties named in the answer in trust and for defendant's use and benefit. Subsequent to the service of the answer on the plaintiff, defendant, upon such answer and proof of service of a notice of motion thereof upon plaintiff's attorneys, obtained an order from the court presumably upon the provisions of Laws 1895, c. 29, sec. 1, which is an amendment of Gen. St. 1894, secs. 5178–5181, bringing into the action plaintiff's lessors as defendants and requiring them to answer defendant's counter-claim. Four of these parties so brought into the case appeared and moved the court for an order vacating and setting aside the order whereby they had been made defendants upon the ground that it had been improvidently issued. The motion prevailed, and defendant appeals from the order whereby the earlier order was set aside and vacated. That part of the answer which set forth the counter-claim was then amended, and the plaintiff filed a general demurrer thereto, while such of the parties brought into the case as had not participated in the motion just mentioned also demurred, practically on the
180 same ground. Both demurrers were sustained, and defendant appeals. These appeals were argued and submitted together.

The controversy over the land in dispute, which is a part of the famous section 30, township 63, range 11, in the Duluth land district, has been raging in the Land Department of the General Government for many years, and in the answer defendant has given the history of this contention with great minuteness. We shall not undertake to state all of the allegations, but only such portion as will serve to make out position clear and well understood.

Defendant Hyde claims to have settled on the land about the 20th of August, 1884, and to have resided upon it ever since. He was then a qualified pre-emptor under the laws of the United States, and the land was vacant, unoccupied, unsurveyed, and subject to pre-emption. Afterwards the land was surveyed and the plat duly filed in the local land office. July 20, 1885, defendant appeared and applied to file a declaratory statement for and upon this particular 40 acres and three other adjoining tracts—160 acres in all. He alleges that he was informed by the local land officers that his

application would be rejected unless limited to the 40, and that he then informed the officers that his house and other improvements were on this tract, and that he intended to claim it as his pre-emption, whether he was successful in a contest which he had instituted against the location of certain half-breed scrip upon the balance of the land covered by his declaratory statement or not. From the indorsement upon the statement itself made by the officers it appears that his application was rejected as to all of the 160 except this 40 for the reason that the date of settlement therein averred did not antedate the unadjusted location of Sioux half-breed
181 scrip No. 19 D, issued to one Moreau, filed for location June 16, 1883, said location having, in the opinion of the officers, withdrawn the land from settlement under the pre-emption act when filed. Defendant thereupon appealed from the decision of the local land officers to the Commissioner of the General Land Office, under the belief, as he alleges, that his application had been entirely rejected. What has become of this appeal does not appear from the answer, except as may be inferred from subsequent allegations. It was alleged that prior to the making of this application the defendant had filed an affidavit of contest against the location of this scrip No. 19 D, and about the same time one McDonald, claiming to be a qualified pre-emptor and to have superior rights as such to 160 acres in the same section, filed another affidavit of contest against the location of scrip No. 19 E on the 160 just mentioned, made by the same person (Moreau) at the same time scrip No. 19 D was located, the grounds of the contest being the same in each case. April 6, 1886, a hearing was had for the McDonald contest on an order of the Commissioner that both cases should then be heard and the validity of the scrip locations determined. Meantime the locations had been adjusted so that No. 19 D covered three 40's included in defendant's declaratory statement before referred to, and No. 19 E covered the 160 claimed by McDonald, and it was further alleged that October 15, 1885, one Sharp, claiming to be the attorney-in-fact of James H. Warren, a mixed blood, had been permitted to locate Chippewa scrip on the 40 here in dispute, no notice thereof having been given to defendant. He first learned of this location April 10, 1886, and immediately filed an affidavit for a contest, alleging his own prior occupation, residence, and improvements, his application to file the declaratory statement, its rejection, and his appeal. December 22, 1888, a hearing was ordered and
182 the order transmitted to the local land officers. What was done, if anything, in the way of a hearing on this order does not appear, but February 18, 1889, the Secretary of the Interior revoked the same. Defendant then moved to set aside the order of revocation. The only allegation in reference to what action has been taken on this motion is that the Commissioner of the General Land Office had wrongfully refused to act upon it. It is perhaps of no consequence, but we are of the opinion that it would be somewhat remarkable if the Commissioner should act upon a motion to set aside an order made by the Secretary, his superior officer.

A copy of the order of the Commissioner whereby a contest was

ordered on the location of scrip No. 19 E is made a part of the answer. From this it appears that what is known as the "McDonald contest" was ordered upon the charges made to the Commissioner by both McDonald and the defendant. It further appears from this answer that all parties to the contest appeared and submitted evidence. It is also alleged in the answer that at this hearing certain evidence, stated in detail, was admitted and received, and that it was irrelevant, incompetent, and immaterial. We need not repeat this evidence, and will simply say that it strongly tended to show the defendant's settlement on the land was not made in good faith for his own use and benefit, but, on the contrary, that he had entered into a contract with at least one other person by which the title he might acquire to the land embraced in his declaratory statement would inure, should he be successful in his contest over the location of scrip No. 19 D, to the benefit of such other person, and therefore that he was absolutely unable to make the oath prescribed in the pre-emption act (Rev. St. U. S., sec. 2262). While there was some equivocation in the testimony of the witnesses
183 on this point, we do not hesitate to say that it was sufficient to sustain a verdict of a jury that the defendant had entered into such a contract or to warrant a finding of a court or of the officers of the Land Department of the same import. Such a verdict or finding would not be disturbed by us on appeal from a trial court. At the conclusion of the taking of the testimony all of the parties to the other contest entered into a stipulation whereby it was agreed that the testimony theretofore taken should be considered in determining the validity of both locations of scrip No. 19 D and 19 E, thus stipulating into the contest over the location of scrip 19 D the testimony taken in the contest over scrip 19 E. There was testimony received at the hearing which tended to establish the allegation made by McDonald and the defendant that the scrip locations were illegal, and, while the local land officers held them valid, their decision was reversed August 4, 1888, by the Commissioner of the General Land Office, and he ordered that the scrip location be held for cancellation, subject to the contestee's right to appeal. In alleging this decision defendant avers that the Commissioner also rejected defendant's application to file on the lands. The contestee thereupon appealed to the Secretary of the Interior, and he affirmed the decision February 18, 1889; but, according to the averments of the answer, the Secretary also held that the lands were open to entry by the first legal applicant. The defendant subsequently obtained from the Secretary an order modifying the decision in so far as it determined that the preference right of entry of either McDonald or defendant was therein decided. There are other allegations in the answer to the effect that no charges were ever made or filed in the Land Department affecting the right of defendant to file on the land as a
184 pre-emptor, or his good faith as a pre-emptor, and that on these questions he has never been heard, because in none of these contests have such questions been in issue, and allegations respecting an application to contest the Warren entry made by one

Hartman; other applications to contest such entry by other parties, and an application by one Chandler to locate scrip on this 40, all of which were refused and rejected by the Commissioner, he holding that the location of the Warren scrip was legal and valid. Appeal being taken to the Secretary by all parties contesting, defendant included, the Secretary decided, May 31, 1892, "that this defendant could claim nothing by virtue of his pre-emptive claim" to the 40 in dispute, but ordered a hearing of the contest made by Hartman. Defendant then moved for a rehearing, making several assignments of error, and November 12, 1892, this motion was denied. When the hearing of the Hartman contest came on in the local land office defendant applied to be made a party thereto and his application was rejected. Again he appealed, and in August, 1893, the Commissioner decided that he had no standing in the case or right to contest the Warren entry. As might be expected, this decision was appealed to the Secretary, and July 20, 1894, the Commissioner's decision was affirmed, and it was ordered that the Warren entry be held for patenting. A patent based on this entry was then issued and delivered. We have therein stated the allegations found in that part of the answer denominated the counter-claim, from which it seems certain that this controversy has occupied the attention and commanded the time of the local land officers, the Commissioner of the General Land Office, and the Secretary of the Interior quite steadily for more than 10 years. If persistency always brought reward and was enough in itself to support a con-
185 clusion that defendant's claim to the land was well founded and meritorious, he would have been awarded it years ago.

We do not find it necessary to consider a number of the points made in the briefs, but shall rest our conclusion that the order sustaining the demurrers must be affirmed upon the proposition heretofore stated, that the testimony we have referred to, as detailed in the answer, was sufficient to justify a finding by the Commissioner and the Secretary that this defendant could not make the oath required of him as a preliminary condition to his right to enter Government land under the pre-emption act—a finding evidently made and on which all subsequent action seems to have been predicated. We are not required to express any opinion upon the merits of the claim made by defendant to this land, aside from those mentioned, and expressly decline so to do; nor are we to determine to precisely what extent it is the province of a court of equity to inquire into the facts of a case like this, notwithstanding the decisions of the Land Department. As before indicated, our decision will be rested upon the proposition stated in reference to the testimony taken at the hearing in respect to the location of scrip No. 19 E, and thence stipulated into the contest over the location of scrip No. 19 D. At this hearing testimony was taken and submitted, not only in reference to the legality of the scrip locations, but also the claims and rights of the pre-emption applicants, McDonald and defendant Hyde. This testimony was not objected to in any manner, so far as has been shown by the answer, as it should have been if the parties wished to avail themselves of a claim in those cases, or elsewhere,

that such testimony was irrelevant, incompetent, or immaterial. If
the contestants chose to voluntarily litigate the question as to
186 their rights or qualifications as pre-emption claimants at
those hearings, they are not now in position to say that the questions were not litigated because not strictly within the issues ordered to be heard, and that the testimony was of no effect. If, upon the other hand, the testimony in reference to contestants' rights and qualifications was properly in that case, and it may have been, in order to give the contestants any standing before the department, it was properly there for every purpose, and the contestants would be bound by it. So that it is immaterial whether such testimony was introduced at the hearing by consent—that is, the questions were voluntarily litigated—or legitimately, and as bearing upon a proper subject of inquiry. It is also to be borne in mind that when these hearings were had the defendant's right to file a declaratory statement and to enter land under the pre-emption act was before the Land Department upon appeal from a decision of the local land officers rejecting his filing. It is alleged that when deciding the scrip contests the Commissioner rejected defendant's application to file a declaratory statement, and, further, that in his decision of February 18, 1889, the Secretary held that the lands involved in the scrip-location contests were open to entry by the first legal applicant; and it is also alleged that in May, 1892, the Secretary held that the defendant could claim nothing by virtue of his pre-emption claim. The first of these decisions was in the matter of the contests wherein the damaging testimony was introduced, and upon the face of the answer must be regarded as a finding that defendant could not legally comply with the conditions of the pre-emption act; nor was it necessary whenever defendant asserted his claim to be entitled to pre-empt the entire 160 or any
part thereof to again take testimony, again consider it, and
187 again determine that which had once been passed on. It
was not error to dispose of defendant's pre-emption claim, as seems to have been done, whenever asserted after the scrip-location contest, by reference to another decision, and holding it invalid. This was the ruling of the Secretary November 12, 1892 (Hyde *v.* Warren, 15 Land Dec. Dep. Int., 415); to which ruling reference is made in the answer. In the Land Department the question was *res judicata* upon the same principle as would be applied in a court of justice if there had been a verdict against defendant followed by a judgment, an estoppel by verdict. The competency of the defendant to comply with the requirements of the pre-emption act—his qualification as a pre-emptor—was a question of fact peculiarly for the determination of the officers of the Land Department. It has repeatedly been held that the decision of these officers is conclusive on a question of fact in the absence of fraud. Vance *v.* Burbank, 101 U. S., 514, and cases cited. But if this had not been held, it is obvious that we should give to the evidence on which a finding is made by the department officers as much weight as we would give to evidence received upon the trial of an ordinary civil action in our own courts. We do not reverse a finding if the evi-

dence reasonably tended to support it, and it is wholly immaterial whether the fact determined relates to the qualifications of a claimant to enter land under the pre-emption act or to the settlement and improvements under which he claims the right to enter; but counsel for defendant urge that the stipulation through which the testimony we have referred to was stipulated into the contest over the location of scrip No. 19 D on part of the land described by defendant in his declaratory statement was that such testi-
mony should be considered in determining the validity of the
188 scrip locations, and nothing more. But, as before stated, it appears that these contests were initiated and prosecuted by McDonald and defendant jointly, and the testimony was in this case actually taken without objection, either as bearing upon an issue which the parties last named had volunteered to litigate or as properly being within the issues—always tried without pleadings in land contests, and in proceedings much more informal than in a court of justice—and thus competent and material in all respects. If the defendant desired to exclude this particular testimony from consideration he should have so stipulated, and evidently he did not do so. The evidence was in both cases without objection or reservation. No restrictions were placed upon it, and nothing to indicate that it was not to be considered and passed upon. He thus waived the irregularity, if there was any. The testimony was before the land officers for all legitimate purposes. They determined the question of fact presented, and there is no reason why we should disturb the finding. The order sustaining the demurrers must be affirmed. It therefore seems unnecessary for us to discuss the merits of the question presented by the other appeal, and the order appealed from must be affirmed. It is so ordered.

189 *Second Opinion.*

BISHOP IRON CO.
v.
HYDE ET AL.

(Supreme Court of Minnesota, April 22, 1898.)

Appeal—Review—Entry of judgment.—The decision on the former appeal (68 N. W., 95; 66 Minn., 24) adhered to. Where the judgment entered by the clerk is unauthorized by the verdict, findings, or order of the court, the remedy is by application to the trial court to correct or vacate a judgment, and, unless such application has been made, this court will not consider the question on appeal.

(Syllabus by the court.)

Appeal from district court, St. Louis county; J. D. Ensign, judge.

Action by the Bishop Iron Company against Thomas W. Hyde, Frank B. Forman, and others. From a judgment in favor of Frank B. Forman on the demurrer to the cross-bill of defendants Thomas W. Hyde and another, the latter appeals. Affirmed.

John Jenswold, Jr., and John Brennan for appellant; Draper, Davis & Hollister for respondent Bishop Iron Co.; White & McKeon and J. B. Richards for respondents Huntress *et al.*; Wilson & Van Derlip for respondents Frank B. Forman and others.

MITCHELL, *J.*:

Every question presented by the first 10 assignments of error is covered by the decision on the former appeal (66 Minn., 24; 68 N. W., 95). By the eleventh assignment of error it is sought to make the point that the judgment entered by the clerk in favor of the respondents other than the plaintiff was not the proper one to enter upon the order sustaining their demurrer to the defendants' cross-bill. The error complained of was not that of the court, but of the clerk, and the remedy is not by appeal from the judgment, but by application to the trial court to have the judgment corrected, and, unless the power of that court has been thus invoked,
190 this court will not consider the question on appeal from the judgment. Scott *v.* Railway Co., 42 Minn., 170; 43 N. W., 966. Judgment affirmed.

191 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898.

BISHOP IRON COMPANY, Plaintiff, Respondent,
vs.
THOMAS W. HYDE, Appellant; FRANK B. FORMAN ET AL., Defendants; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Jos. H. Sharp, John P. Johnson, and N. J. Miller, Defendants, Respondents. } No. 56.

Pursuant to an order of court duly made and entered in this cause on the third day of May, A. D. 1898, it is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the eleventh judicial district, sitting within and for the county of St. Louis, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the plaintiff, respondent, above named, do have and recover of said Thomas W. Hyde, appellant herein, the sum and amount of forty-six dollars ($46.00), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 3rd day of May, 1898.

By the court:

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25.00
Clerk's fees for making return	
Printer's fees	13.00
Clerk's fees, supreme court	7.50
Filing mandate	
Affidavits and acknowledgments	
Postage	
Copying returns for printer	
	$46.00

STATE OF MINNESOTA, } ss:
Supreme Court, }

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this third day of May, A. D. 1898.

D. F. REESE, *Clerk.*

[Endorsed:] 10959. State of Minnesota, supreme court. Transcript of judgment. Filed May 3rd, A. D. 1898. D. F. Reese, clerk. —— ——, attorney for —— ——. Page No. 465, "V" Book.

192 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898.

BISHOP IRON COMPANY, Plaintiff, Respondent,
vs.
THOMAS W. HYDE, Appellant; FRANK B. FORMAN ET AL., Defendants; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Defendants, Respondents. } No. 56.

Pursuant to an order of court duly made and entered in this cause on the third day of May, A. D. 1898, it is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the eleventh judicial district, sitting within and for the county of St. Louis, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that the defendants, respondents, above named, do have and recover of said Thomas W. Hyde, appellant herein, the sum and amount of thirty-seven and $\frac{65}{100}$ dollars ($37.65), costs and disbursements in this cause in this court, and that said respondents have execution for the enforcement thereof.

Dated and signed this 3rd day of May, 1898.

By the court:

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25.00
Clerk's fees for making return	4.25
Printer's fees	7.50
Clerk's fees, supreme court	.50
Filing mandate	.25
Affidavits and acknowledgments	.15
Postage	
Copying returns for printer	
	$37.65

STATE OF MINNESOTA, } ss:
Supreme Court, }

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within

copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 3rd day of May, A. D. 1898.

D. F. REESE, *Clerk.*

[Endorsed:] 10959. State of Minnesota, supreme court. Transcript of judgment.

Endorsed: Filed May 3rd, A. D. 1898. D. F. Reese, clerk. —— ——, attorney for —— ——. Page No. 466, " V " Book.

193 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898.

BISHOP IRON COMPANY, Respondent,
vs.
THOMAS W. HYDE, Appellant; Frank B. Forman *et al.*, Def'ts, Respondents.

No. 56. Appeal from District Court, Eleventh Judicial District, County of St. Louis.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1898, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below, herein appealed from, be, and the same hereby is, in all things affirmed, and that the respondents above named have judgment accordingly.

Entered May 3, A. D. 1898.

By the court:

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: D. F. REESE, *Clerk.*

[Endorsed:] No. 10959. State of Minnesota, supreme court. Copy of order for judgment.

Endorsed: Filed May 3, A. D. 1898. D. F. Reese, clerk. Entered on page 129, M.

194 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1898.

MONDAY MORNING, 9.30 O'CLOCK, *April* 18, *A. D.* 1898.

Court convened pursuant to adjournment, all the justices being present.

BISHOP IRON COMPANY, Respondent,
vs.
THOMAS W. HYDE, Appellant; FRANK B. FOREMAN *et al.*, Respondents.
} Cal. No., 56: Reg. No., 10959.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was submitted to the court for decision upon paper book and briefs of counsel and taken under advisement.

A true record.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest: D. F. REESE, *Clerk.*

[Endorsed:] 10959. State of Minnesota, supreme court. Copy of minutes of argument.

Endorsed: Filed May 3, A. D. 1898. D. F. Reese, clerk.

195 [Endorsed:] No. 10959. State of Minnesota, supreme court. Bishop Iron Co., respondent, against Thomas Hyde, appellant; Frank B. Forman and Fred B. Huntress *et al.*, def't-, resp't-. Judgment-roll.

Endorsed: Filed May 3rd, 1898. D. F. Reese, clerk.

196 UNITED STATES OF AMERICA,
State of Minnesota, County of Ramsey, } *ss:*

In pursuance of the command of the writ of error within, I, D. F. Reese, clerk of the supreme court of the State of Minnesota, herewith transmit a true copy of the record, petition, assignment of errors, bond, order allowing writ of error, first and second opinion, judgment, and all proceedings in the case of Bishop Iron Company, defendant in error, *vs.* Thomas W. Hyde, plaintiff in error, and Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, defendants in error, lately pending in the supreme court of the State of Minnesota, under my hand and the seal of said court.

Witness my official signature and the seal of said supreme court, at the city of St. Paul, in the State of Minnesota, this twentieth day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE,
Clerk of the Supreme Court of the State of Minnesota.

197 UNITED STATES OF AMERICA:

In Supreme Court.

BISHOP IRON COMPANY, Defendant in Error,
vs.
THOMAS W. HYDE, Plaintiff in Error; FRED F. HUNTRESS, SAMUEL C. BROWN, HENRY A. SMITH, JOSEPH H. SHARP, JOHN P. JOHNSON, N. J. MILLER, FRANK R. WEBBER, FRANK W. FORMAN, and FRANK B. FORMAN, Defendants in Error.

Statement of Errors on Which the Plaintiff in Error Intends to Rely and of the Parts of the Record Which He Thinks Necessary for the Consideration Thereof.

You will please take notice that hereto annexed and herewith served upon you is a copy and statement of the assignment of errors on which the plaintiff in error intends to rely in the above-entitled action in the Supreme Court of the United States, and that the following is a statement of the parts of the record which the plaintiff in error thinks necessary for the consideration thereof:

1. Complaint of the Bishop Iron Company.
2. Motion for order bringing in additional parties defendant.
3. Order bringing in additional parties defendants, dated June 17, 1895.
4. Amended answer and cross-petition.
5. Demurrer of the Bishop Iron Company.
6. Demurrer of Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, and N. J. Miller.
7. Order sustaining demurrer of the Bishop Iron Company, Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Jo-
198 seph Sharp, N. J. Miller, and John P. Johnson.
8. Demurrer of defendants Forman.
9. Demurrer of Frank R. Webber.
10. Order sustaining demurrer of Frank R. Webber, Frank W. Forman, and Frank B. Forman.
11. Reply of the Bishop Iron Company.
12. Findings of fact and conclusions of law of the trial court.
13. Case or bill of exceptions.
14. Notice of settling bill of exceptions.
15. Stipulation that bill of exceptions be settled and motion *of* new trial heard, December 19th, 1896.
16. Motion for new trial.
17. Order denying motion for new trial.
18. Amended findings of fact and conclusions of law.
19. Judgment in favor of the Bishop Iron Company.
20. Stipulation as to entry of judgment.
21. Judgment in favor of Frank W. Forman, Frank B. Forman, Fred F. Huntress, Samuel C. Brown, Frank R. Webber, Henry A. Smith, Joseph A. Sharp, John P. Johnson, and N. J. Miller.
22. First opinion of the supreme court of the State of Minnesota.

23. Second opinion of the supreme court of the State of Minnesota.

24. Order for judgment made by the supreme court of the State of Minnesota, dated May 3, 1898.

25. Judgment in favor of the Bishop Iron Company, dated May 3, 1898.

26. Judgment in favor of Frank B. Forman, Frank W. Forman, Fred F. Huntress, Samuel C. Brown, Frank R. Webber,
199 Henry A. Smith, Joseph H. Sharp, John P. Johnson, and N. J. Miller.

C. L. CATLIN,
Attorney for Plaintiff in Error, Superior, Wisconsin.

JOHN JENSWOLD, JR., &
JOHN BRENNAN, *Of Counsel.*

To Draper, Davis & Hollister, attorneys for The Bishop Iron Company; White & McKeon, attorneys for Fed F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, and N. J. Miller; J. B. Richardson, attorney for Frank R. Webber; Wilson & Vanderlip, attorneys for Frank W. Forman and Frank B. Forman.

200 UNITED STATES OF AMERICA, }
State of Minnesota. }

In Supreme Court.

BISHOP IRON COMPANY, Defendant in Error, }
vs.
THOMAS W. HYDE, Plaintiff in Error; Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman, and Frank B. Forman, Defendants in Error. } Assignment of Errors.

I.

Thomas W. Hyde, the plaintiff in error in this action, in connec, tion with his petition for a writ of error makes the following assignment of errors, which he avers occurred on the trial of the cause-to wit:

1. The court erred in ordering and entering judgment in favor of The Bishop Iron Company, one of the defendants in error herein, and against the said Hyde, in this:

The facts set forth in said amended answer and counter-claim and admitted to be true by the reply of the said Bishop Iron Company show that the said Thomas W. Hyde, by his settlement, improvements, and residence upon the lands in controversy and his cultivation of the same, and his application to file thereon, and the filing of said application, and his contest of the Warren scrip selection and location, and his motion to cancel the same, and the prosecu-

tion of his rights to said lands before the Department of the Interior, as in said amended answer and counter-claim specifically set forth, acquired a right to be preferred in the acquisition of said lands from the United States and by virtue thereof became, was,
201 and now is the equitable owner thereof, and that but for the erroneous, illegal, mistaken, and unwarranted rulings and decisions of the honorable Secretaries of the Interior and the honorable Commissioner of the Land Office the patent to said lands would, prior to the issuing of the same to the said Warren, as of right it should, have issued to the plaintiff in error, and that judgment should have been entered in his favor.

2. The court erred in finding that the Bishop Iron Company was the owner in fee of any part of the premises in controversy for the reason that the facts set forth in the amended answer and counter-claim of the said Hyde and admitted to be true by the reply thereto show that he, the said Hyde, is the equitable owner of said premises, and that the said Bishop Iron Company holds nothing but the naked legal title to $\frac{13}{16}$ thereof in trust for him.

3. The court erred in finding that the Bishop Iron Company was the lessee of $\frac{12}{16}$ of said lands from the owners thereof, for the facts set forth in the amended answer and counter-claim of the said Hyde and admitted to be true by said reply show that he, the said Hyde, was and is the equitable owner of said lands, and that the lessors of the Bishop Iron Company held nothing but the naked legal title to $\frac{12}{16}$ of said land, subject to the rights of the said Hyde thereto.

4. The court erred in finding that the said Hyde was in the wrongful possession of said premises and has no title to or interest therein, for it appears from the facts set fourth in the amended answer and counter-claim of the said Hyde and admitted to be true by the reply thereto that he, the said Hyde, is the equitable owner of said lands, and as such has been ever since 1884 and now is in the actual, open, exclusive, and rightful possession thereof.

5. The court erred in sustaining the demurrer of Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp,
202 N. J. Miller, and John P. Johnson, part of the defendants in error herein, to the amended answer and counter-claim of the said Thomas W. Hyde in this: The facts set forth in said amended answer and counter claim and which are admitted to be true by said demurrer show that the said Hyde is the equitable owner of said lands, and that any right, title, or interest therein which each or all of said defendants may have or hold jointly or separately they each and all have and hold in trust for said Hyde.

6. The court erred in sustaining the demurrer of Frank W. Forman and Frank B. Forman, two of the defendants in error herein, to the amended answer and counter-claim of the said Hyde, for the reason that the facts set forth in said amended answer and counter-claim and admitted to be true by said demurrer show that the said Hyde is the equitable owner of the lands in controversy, and that any right, title, or interest therein which said defendants in error or either of them have or hold they have and hold in trust for said Hyde.

7. The court erred in sustaining the demurrer of Frank R. Webber, one of the defendants in error herein, to the amended answer and counter-claim of the said Hyde, it appearing from the facts set forth in said amended answer and counter-claim, which are admitted to be true by said demurrer, that the said Hyde is the equitable owner of said land-, and that any right, title, or interest which the said defendant in error has or holds in or to said lands he holds in trust for the said Hyde.

8. The court erred in ordering and entering judgment in favor of Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, N. J. Miller, John P. Johnson, Frank R. Webber, Frank W. Forman, and Frank B. Forman, defendants in error herein, on the amended answer and counter claim of the said Hyde and the demurrers of the said defendants in error thereto "barring and
203 estopping him, the said Hyde, from having or claiming any right, title, or interest, estate, or property in or to any part of the said described lands adverse to said defendants" in error, in this: The facts set forth in said amended answer and counter claim, all of which are admitted to be true by said demurrers, show that the said Hyde was and is the equitable owner of said lands.

9. The court erred in denying the motion of the said Hyde to set aside and vacate the court's findings, decision, and order for judgment herein and for a new trial, in this, (*a*) that the facts set forth in the amended answer and counter claim of the said Hyde, which are admitted to be true by the reply of The Bishop Iron Company and the demurrers of the other defendants in error herein, show that the said Hyde is the equitable owner of the said lands, and whatever right, title, or interest which the defendants in error have or hold in and to said lands they and each of them hold the same in trust for the said Hyde; (*b*) that said findings, decision, and order are contrary to the facts, as admitted by the pleadings herein; (*c*) that said findings, decision, and order are contrary to law; (*d*) that the court erred in sustaining the said demurrers to the amended answer and counter-claim of the said Hyde.

II.

The plaintiff in error further says that in the record and proceedings in the above-entitled action there is manifest error, in this, to wit:

1. It was error for the court to hold that the Secretary of the Interior had a right to consider the testimony in reference to the contract of Hyde and McDonald with their attorney, taken in the case of McDonald *vs.* Eaton *et al.*, for the reason that the Secretary
in considering the same acted in violation and in disregard
204 of law and the usual and regular rules of practice of the department, and there was no such issue in said case.

2. It was error for the court not to consider the fact that the Secretary of the Interior made a mistake in reference to the testimony of the said Hyde given in the case of McDonald *vs.* Eaton *et al.*

3. It was error for the court to hold that the Secretary of the Interior could properly find that an illegal contract had been made

in reference to said lands, for the reason that said testimony, properly read, did not and does not show that he, said Hyde, ever made an illegal contract in reference thereto.

4. It was error for the court to hold that the Secretary of the Interior could consider and properly did consider the testimony in reference to said contract taken upon the hearing of the said case of McDonald *vs.* Eaton *et al.* in considering the said case of Hyde *vs.* Eaton *et al.*, for the reason that said testimony was not received in the Hyde case; the only testimony in the McDonald case which was stipulated into the Hyde case was that bearing upon the legality of the location of the Sioux half-breed scrip No. 19 D, which was the only issue in said case.

5. It was error for the court to hold that the Commissioner of the General Land Office properly dismissed the said Hyde contest against the said Warren script selection or location, for the reason that said Commissioner had no power or authority to dismiss the said contest without notice to the said Hyde, and the decision of the Secretary upon which he based his action was erroneous, unlawful, and unwarranted, and made in another case in which the question was not at issue, and to which the said Hyde was not a party, on incompetent, irrelevant, and mistaken testimony.

205 6. It was error for the court to hold that the "McDonald contest was ordered upon charges made to the Commissioner by both McDonald and the defendant" (the said Hyde), because such is not the fact, as alleged in the answer of the said Hyde.

7. It was error for the court to hold that in the said McDonald contest and the contest of the said Hyde against the said scrip locations they voluntarily litigated the question as to their respective pre-emption rights, for the reason that said holding was contrary to the fact, as alleged in said demurrer.

8. It was error for the court to hold that when the decision of the Secretary was made in the said contests against the Sioux half-breed scrip locations the rights of the said McDonald and of the said Hyde as pre-emptors were before him, for the reason that it is alleged in the said answer of said Hyde that said McDonald at said time had exhausted his pre-emption right, and the application of the said Hyde to file his declaratory statement on lots five and six and the S. E. ¼ of the N. W. ¼ of the said section 30 had been rejected by the Commissioner of the General Land Office on the ground that it did not antedate said Sioux half-breed scrip location No. 19 D, and no appeal had been taken therefrom, and for the further reason that the said Secretary did not decide that the rights of the said McDonald and of the said Hyde as pre-emptors were before him, but that he by virtue of his supervisory power could on incompetent, irrelevant, and immaterial testimony taken in another case before him act in a case which was not before him, which ruling was erroneous and unlawful.

9. It was error for the court to hold that the respective contests of the said McDonald and of the said Hyde "were initiated and prosecuted by the said McDonald and the defendant (the said Hyde)

jointly," for the reason that it is alleged in the answer that they were initiated and prosecuted separately.

206 10. It was error for the court to hold that the said testimony in reference to the said *contract* was in both cases the respective contests of the said McDonald and of the said Hyde against the said Sioux half-breed scrip locations without objection or reservation.

Wherefore the plaintiff in error prays that the judgment of the said State court be reversed, and that he have judgment decreeing him to be the equitable owner of said lands, and requiring the defendants in error to convey the same unto him, and for such other and further relief as may be just, and for costs.

JOHN JENSWOLD, JR., AND
JOHN BRENNAN,
Attorneys for Plaintiff in Error.
CHARLES L. CATLIN,
Attorney for Plaintiff in Error.

207 [Endorsed:] United States of America. In Supreme Court. Bishop Iron Co. *vs.* Thomas W. Hyde. Statement of errors on which the plaintiff in error intends to rely and of the record which he thinks necessary for the consideration thereof.

Service of the within statement admitted this — day of September, 1898.

——— ———,
Attorneys for Frank W. Forman and Frank B. Forman.

Service of the within statement admitted this 17th day of September, 1898.

DAVIS, HOLLISTER & HICKS,
Att'ys for Bishop Iron Co. Only.
WHITE & McKEON,
Attorneys for Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, & N. J. Miller.
J. B. RICHARDS,
Attorney for Frank R. Webber.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

George E. La Clair, being duly sworn, deposes and says that on the 16th day of September, A. D. 1898, at the city of Minneapolis, county of Hennepin and State of Minnesota, he served the within statement of errors upon Wilson & Van Derlip, attorneys for Frank W. Forman & Frank B. Forman, defendants in error in the within-entitled action, by handing to and leaving with John R. Van Derlip, one of said attorneys, a true and correct copy of said statement of errors.

GEORGE E. LA CLAIR.

Subscribed and sworn to before me this 16th day of September, 1898.

[Notarial Seal, Hennepin Co., Minn.]

F. D. TOURBEE,
Notary Public, Hennepin County, Minnesota.

208 [Endorsed:] Case No. 16,973. Supreme Court U. S., October term, 1898. Term No., 388. Thomas W. Hyde, pl'ff in error, *vs.* Bishop Iron Co. *et al.* Designation by counsel for pl'ff in error of parts of record to be printed and assignment of errors, with proof of service. Office Supreme Court U. S. Filed Oct. 1, 1898. James H. McKenney, clerk.

[Endorsed:] United States of America. In Supreme Court. Bishop Iron Company, defendant in error; Thomas W. Hyde, plaintiff in error; Fred F. Huntress and others, defendants in error. Return to writ of error by clerk of State court.

Endorsed on cover: Case No. 16,973. Minnesota supreme court. Term No., 126. Thomas W. Hyde, plaintiff in error, *vs.* Bishop Iron Company *et al.* Filed September 3d, 1898.

In the Supreme Court of the United States

OCTOBER TERM, 1899.

BISHOP IRON COMPANY,
DEFENDANT IN ERROR,

vs.

THOMAS W. HYDE,
PLAINTIFF IN ERROR,

No. 126.

In Error to the Supreme Court of the State of Minnesota

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is an action of ejectment brought by the Bishop Iron Company, defendant in error, against Thomas W. Hyde, plaintiff in error, in the District Court of St. Louis county, Minnesota. The complaint is in the usual form of complaints in such actions. On motion of Hyde, Fred B. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, N. J. Miller, Frank R. Webber, Frank W. Forman and Frank B. Forman were made defendants in the case. The plaintiff in error, Hyde,

answered and therein set up an equitable counter-claim, claiming that by virtue of certain proceedings taken by him before the land department specifically set forth in the answer, he was the equitable owner of the land, and praying that the Bishop Iron Company and his co-defendants be decreed to hold any and all interest which they held in the land in trust for him, and that they be compelled to convey accordingly. The Bishop Iron Company demurred to the counter-claim on the ground that the facts therein stated did not constitute a defense. The defendants Huntress, Brown, Smith, Sharp, Johnson and Miller demurred to the counter-claim on the ground that it did not state facts sufficient to constitute a cause of action, and the defendants Forman also demurred to the counter-claim on the ground that the court had no jurisdiction of the subject of the action, and that it did not state facts sufficient to constitute a cause of action. The defendant Webber demurred to the counter-claim on the ground that it did not state facts sufficient to constitute a cause of action. The trial court sustained each and all of these demurrers. From the order sustaining them Hyde appealed to the State Supreme Court, and the decision of the trial court was affirmed, and the case was remitted for further proceedings according to law. After the record was transmitted from the Supreme Court to the trial Court the Bishop Iron Company withdrew its demurrer and interposed a reply in which it admitted all the facts set forth in the counter-claim to be true. The case was tried to the Court without a jury, and the Bishop Iron Company introduced conveyances of 13-25 of

the land from Warren to whom it was patented, and a lease of 12-25 from the grantees of Warren. No other evidence was introduced. Upon this evidence and the order sustaining the demurrers judgment was entered in favor of the Bishop Iron Company for the possession of the land, and also in favor of the co-defendants, barring Hyde from all right, title and interest in the land. From these judgments Hyde appealed to the State Supreme Court, and they were there affirmed. Hyde sued out a writ of error to this court, and the question which arises here, and the sole question, is whether or not the facts set forth in Hyde's counter-claim are sufficient to show that he is the equitable owner of the land.

ASSIGNMENTS OF ERROR.

The plaintiff in error filed nineteen assignments of error, the first nine of which for the sake of brevity may be summarized as follows:

I.

1. The court erred in deciding that the plaintiff in error, Thomas W. Hyde, was not the equitable owner of the lands in question; and that the following findings, orders and judgments based upon such decision were therefore erroneous:

2. The finding that the Bishop Iron Company is the owner in fee of part of said lands.

3. The finding that said Iron Company is the lessee of any other part thereof.

4. The finding that Hyde is in the wrongful possession of the lands.

5. The order sustaining the demurrers to the amended answer and counter-claim of Hyde.

6. The entering of judgments on such demurrers and on the reply of the Bishop Iron Company.

7. Denying the motion of Hyde to set aside such findings and orders and for a new trial.

II.

The plaintiff in error also makes the following additional assignments of error:

1. It was error for the Court to hold that the Secretary of the Interior had a right to consider the testimony in reference to the contract of Hyde and McDonald with their attorney taken in the case of McDonald vs. Eaton, et al, for the reason that the Secretary in considering the same acted in violation and in disregard of law and the usual and regular rules of practice of the department, and there was no such issue in said case.

2. It was error for the Court not to consider the fact that the Secretary of the Interior made a mistake in reference to the testimony of the said Hyde given in the case of McDonald vs. Eaton et al.

3. It was error for the Court to hold that the Secretary of the Interior could properly find that an illegal contract had been made in reference to said lands for the reason that said testimony properly read did not and does not show that he, said Hyde, ever made an illegal contract in reference thereto.

4. It was error for the Court to hold that the Secretary of the Interior could consider and properly did consider the testimony in reference to said con-

tract taken upon the hearing of the said case of McDonald vs. Eaton, et al, in considering the said case of Hyde vs. Eaton et al for the reason that said testimony was not received in the Hyde case; the only testimony in the McDonald case which was stipulated into the Hyde case was that bearing upon the legality of the location of the Sioux Half Breed scrip No. 19 D. which was the only issue in said case.

5. It was error for the court to hold that the commissioner of the general land office properly dismissed the said Hyde contest against the said Warren scrip selection or location, for the reason that said commissioner had no power or authority to dismiss the contest without notice to the said Hyde, and the decision of the secretary, upon which he based his action, was erroneous, unlawful and unwarranted, and made in another case in which the question was not in issue, and to which the said Hyde was not a party on incompetent, irrelevant and mistaken testimony.

6. It was error for the court to hold that the "McDonald contest was ordered upon charges made to the commissioner by both McDonald and the defendant" (the said Hyde) because such is not the fact as alleged in the answer of the said Hyde.

7. It was error for the court to hold that in the said McDonald contest, and the contest of the said Hyde against the said scrip locations, they voluntarily litigated the question as to their respective preemption rights for the reason that said holding is contrary to the fact as alleged in said answer.

8. It was error for the court to hold that when the decision of the secretary was made in the con-

tests against the Sioux Half Breed Scrip locations the rights of the said McDonald and of the said Hyde as pre-emptors were before him, for the reason that it is alleged in the said answer of said Hyde, that said McDonald at said time had exhausted his pre-emption right, and the application of the said Hyde to file his declaratory statement on lots five and six and the SE¼ of the NW¼ of the said section 30 was not before him, and for the further reason that said secretary did not decide that the rights of the said McDonald and of the said Hyde as pre-emptors were before him, but that he by virtue of his supervisory power could on incompetent, irrelevant and immaterial testimony taken in another case pass upon their pre-emption rights, which ruling was erroneous and unlawful.

9. It was error for the court to hold that the respective contests of the said McDonald and of the said Hyde "Were initiated and prosecuted by the said McDonald and the defendant (the said Hyde) jointly," for the reason that it is alleged in the answer that they were initiated and prosecuted separately.

10. It was error for the court to hold that the said testimony in reference to the said contract was in both cases—the respective contests of the said McDonald and of the said Hyde against the Sioux Half Breed Scrip locations without objection or reservation.

ARGUMENT.

I.

It will be unnecessary to argue the different assignments of error separately. The controlling

question in the case is whether or not the facts set forth in the answer by Hyde by way of counterclaim constitute a cause of action. We admit the patenting of the land to James H. Warren and the conveyance of 13-25 thereof to the Bishop Iron Company and of 12-25 made to grantees who leased the same to it, so that unless Hyde by virtue of the proceedings taken by him before the Land Department as set forth in his answer is the equitable owner of the land and entitled to compel a conveyance thereof from those holding the legal title the plaintiff in the trial court should have recovered.

The facts constituting the counter-claim of the plaintiff in error and showing the proceedings taken by him before the Land Department as set forth in the amended answer are as f llows: that the Bishop Iron Company is a corporation; that the defendant Hyde has been in the actual, open and exclusive possession of the land in controversy claiming to own the same ever since August 20th, 1884. (Record page 13)

That the defendant in error and other parties made defendants claim some interest in the land adverse to Hyde, but said claims are without legal right or authority. (Record page 13)

That on August 20th, 1884, the land was unsurveyed government land, subject to pre-emption. The plat of survey of said lands was filed in the local land office July 20th, 1885 (record page 14).

When Hyde went into possession of the land he was a qualified pre-emptor settled upon the same with the bona fide intention of acquiring title thereto

under the pre-emption laws; that he built a house, made improvements and has ever since lived upon and cultivated the land (record page 14).

On July 20th, 1885, Hyde, *in good faith*, and for the purpose of acquiring title to the land in controversy duly made application to file his pre-emption, declarators statement for said lands (N. E. ¼ of S. W. ¼ of Section 30, and Lots 5 and 6 and S. E. ¼ of N. W. ¼ of said Section 30) and tendered the land officers the fees therefor.

That the local land officers received said application and informed Hyde that they would reject the same unless limited to said N. E. ¼ of S. W. ¼ of said Section 30. Hyde then informed the officers that his house and the land he had cultivated was upon said N. E. ¼ of S. W. ¼, and that he desired and intended to claim the same as a pre-emption, whether or not he was successful in his contest which was then pending against a S. H. B. scrip location upon lots 5 and 6 and S. E. ¼ of N. E. ¼ of said Section 30. The local land officers retained his application and informed him that if he was a settler in good faith that by what he had done his rights were as fully protected as they could be under the rules. That on that day, but at what time Hyde is unable to state, the Register of said land office endorsed upon his application the following:

"Land Office, Duluth, Minn., July 20th, 1885. The within application to file D. S. on the within described land is refused as to the SE¼ of the NW¼ and lots 5 and 6 of Sec. 30, T. 63, R. 11 W. for the reason that the date of settlement alleged herein

does not ante-date the unadjusted location of Sioux half breed scrip No 19 E, in the name of Orile Moreau, filed for location June 16, 1883. Said unadjusted scrip location having withdrawn said land from settlement under the pre-emption law subsequent to said date of filing of said scrip, towit: June 16, 1883, you are allowed thirty days for appeal, and are advised that if you fail to do so within that time, this decision will be final." (Record, page 15.)

That the land officers retained said application and on the 20th day of August, 1885, endorsed thereon "Filed Aug. 20, 1885." Hyde did not know of said endorsements and relied upon what the land officers told him, and supposing his application to have been rejected as to all the lands, appealed from the decision of such officers. (Record, page 15.)

That on October 15th, 1885, one Sharp, pretending to act for James H. Warren, an alleged mixed blood of the Chippewas, to whom a certificate of identity unlawfully and without authority was issued by the Commissioner of Indian Affairs under the 7th Section of the 2nd Article of the treaty between the United States and the Chippewa Indians, selected said NE¼ of SW¼ of said section 30; that Hyde had no notice of such selection until April 10th, 1886. (Record, page 15.)

That Warren's selection was not made by his attorney in fact, but was made for the benefit of other parties, and they all had notice of Hyde's rights and made the selection with the intention of defeating such rights. (Record, page 16,)

That on April 10th, 1886, Hyde contested the

said Warren selection, and in said application stated that he desired and intended to claim and demand his pre-emption right to the said NE¼ of the SW¼, section 30, whether successful in his contest against the Sioux half-breed location or not, and on December 22nd, 1888, a hearing was ordered by the honorable commissioner of the general land office to determine which had the superior right to said land, Warren or Hyde. (Record, page 16.)

That on June 16th, 1883, S. H. B. scrip Nos. 19 D and 19 E were located by one Eaton in the name of one Stram, No. 19 D, upon lots 3, 5 and 6, and SE¼ of NW¼ of section 30, and 19 E upon lots 1 and 2 and SW¼ of NE¼, and NW¼ of SE¼, section 30. (Record, page 16.)

That on October 9th, 1884, Hyde contested said scrip location 19 D on the ground that the same was *illegally* located. (Record, page 16.) That on October 5th, 1884, one McDonald contested scrip location No. 19 E on the same grounds. (Record, page 17.)

That on the 14th day of November, 1885, the commissioner of the general land office ordered a hearing to determine the legality of both of said scrip locations (record page 17).

That the order of hearing was transmitted to the local land office and notice of hearing in each of said cases was issued. (Record page 17, Exhibits B and C, record pages 26 and 27).

That pursuant to said notice the contest of McDonald came on for hearing April 6th, 1886, and testimony was submitted, that on said hearing irrelevant, incompetent and immaterial testimony in re-

lation to a contract between Hyde and McDonald and S. F. White, their attorney, as set forth in pages 18 and 19 of the record was erroneously admitted.

That at the conclusion of the taking of the testimony in the McDonald case a stipulation was made that the testimony in that case should be considered in determining the legality of both scrip locations Nos. 19 D and E (record page 20).

That no testimony was admitted or received in the Hyde case other than that which went in under said stipulation, and that was admitted for the purpose *and that only of determining the validity of scrip location No. 19 D.* The validity of said scrip locations was the only issue in either of said contests. The local land officer held both of said scrip locations valid (record page 20).

That Hyde and the said McDonald appealed from said decision separately and assigned as error, 1st: because the Register and Receiver was never authorized or directed to decide said case. 2nd: because the so-called decision is contrary to the evidence and the facts. 3d: because the so-called decision is contrary to law. 4th: because the so-called decision treats the case as though the contest was one between the scripee and her attorney, whereas it grew out of a contest by third parties who claim and have shown that the scrip entry was fraudulent on the part of both the scripee and her grantees. 5th: That the local land officers in their so-called decision failed to pass upon the vital question in the case, namely, whether or not the land

contained improvements made by or under the personal supervision or direction of the scripee and were for her personal use and benefit. (Record page 20).

The said appeals came on for hearing before the assistant commissioner of the general land office, and he, on August 4th, 1888, cancelled both of said scrip locations on the ground that "The evidence showed conclusively that the scripee never saw the land or the improvements or had anything whatever to do with either." (record page 20)

That Eaton, attorney for Stram, appealed from said decision to the Secretary of the Interior, William F. Vilas, and he on February 18th, 1889, affirmed the decision of the commissioner cancelling the scrip locations, but erroneously and contrary to law declared said land open to entry by the first legal applicant (record pages 20 and 21).

That the appeal of said Hyde from the rejection of his application to file as a pre-emptor so far as related to said lots 5 and 6 and the S. E. ¼ of the N. W. ¼ of said Section 30 was not before the Secretary. That at that time the said McDonald had exhausted his pre-emption right which fact was before said decision brought to the attention of said Secretary, William F. Vilas. That prior to said decision no charge was ever made or filed against the right of either the said Hyde or McDonald in either of said cases to file on said lands or any lands as pre-emptors, and on the question of said Hyde's good faith in making said applications to file on said lands he never had a hearing or his day in court. That notwithstanding the fact that McDonald had ex-

hausted his pre-emption right and that said appeal of said Hyde from the rejection of his application to file on said land as a a pre-emptor was not in issue in either of said cases or before the Secretary, and that Hyde had never had a hearing on his right to file on said land as a pre-emptor, it was determined erroneously and contrary to law by said Secretary and that a hearing had been had, on their rights as pre-emptors and that he by virtue of his supervisory power had the right to pass upon them, and by making a mistake as to the testimony of said Hyde decided that the testimony showed it was impossible for either of them to make the affidavit required by Section 2262 R. S. U. S., "That he had not directly or indirectly made any agreement or contract in any way or manner with any person whatsoever by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself, and that his application to file should be treated as though it had been filed and that it ought to be cancelled if filed." That Hyde's testimony as it in fact was is as follows: "It (the contract) contained that when I proved up on the land I was to secure him *on* a one-half interest"; that it was mistaken and misquoted so as to read "It contained that when I proved up I was to secure him a one-half interest." (Record page 21.)

That thereafter said Hyde duly made a motion to review said decision on the grounds of said mistake, and that his rights as a pre-emptor were not in issue in said contest, and that it was error for said Secretary to hold that said lands were open to entry by the first legal applicant. That thereafter the same came

on for hearing, and on the 28th day of January, 1891, the Secretary of the Interior (John W. Noble) modified said decision of Secretary Vilas by holding and deciding that the preference right of entry of neither the said Hyde nor McDonald was decided thereby, but erroneously and contrary to law denied said motion in all other respects. (Record page 22)

That on the 8th day of March, 1889, the commissioner of the general land office without notice to the said Hyde and without authority of law, based on Secretary Vilas' decision, revoked the order of December 22nd, 1888, and dismissed the contest of the said Hyde against the said Warren selection. (Record page 22.)

On learning of this action said Hyde made a motion to set aside said last order, which motion has never been passed upon, and that the commissioner unlawfully and wrongfully neglected to pass upon the same.

That on the 19th day of March, 1889, one Hartman filed an application to contest the entry of the said Warren which was refused, and he appealed to the Commissioner of the General Land Office. That on the 23rd day of February, 1889, various other parties made application to contest the said Warren selection and enter said lands, which were rejected, and appeals taken therefrom to the Commissioner of the General Land Office. That on the 16th day of October, 1889, the Commissioner erroneously and contrary to law held that said location by said Warren was valid, and that the said affidavit of contest of the said Hartman did not present sufficient grounds for a

contest and erroneously and contrary to law failed, refused and neglected to pass upon said motion of the plaintiff in error to reinstate his said contest against the Warren scrip location. That from the decision of the Commissioner of the General Land Office all parties including plaintiff in error and excepting the said Warren appealed to the Secretary of the Interior and by stipulation of counsel of all parties interested the said appeals came on for hearing before the Secretary of the Interior on the 19th day of October, 1891, (record page 22) and he on the 31st day of May, 1892, erroneously and contrary to law based upon the decision of Secretary Vilas of February 18th, 1889, decided "That the defendant (plaintiff in error) could claim nothing by virtue of his preemption claim to said N. E. ¼ of the S. W. ¼ of Section 30" and directed the Commissioner to order a hearing upon Hartman's contest. That the plaintiff in error filed a motion for review of said decision on the grounds set forth on page 22 of the record, and on the 12th day of November, 1892, the Secretary, based on the decision of Secretary Vilas, erroneously and contrary to law denied said motion. That the Commissioner ordered a hearing on the contest of said Hartman, and notice thereof was given, and the same came on for hearing before the local land officers on the 17th day of January, 1893, at which time and place the plaintiff in error duly appeared and applied to be made a party thereto and be heard and offered evidence in support of his settlement, residence and improvements upon said lands, which application and offers were erroneously and contrary to law rejected

and denied by the local land officers. That the plaintiff in error appealed to the Commissioner of the General Land Office and he on the 21st day of August, 1893, erroneously and contrary to law based upon the decision of Secretary Vilas decided that the plaintiff in error had no standing in the case (record page 23).

That plaintiff in error appealed to the Secretary of the Interior and he on the 20th day of July, 1894, erroneously and contrary to law based upon the decision of Secretary Vilas affirmed the decision of the Commissioner and directed the entry of said Warren be held for patenting.

That on December 22nd, 1894, patent to said lands erroneously and contrary to law issued to James H. Warren. (Record page 22).

That Hyde by his residence and improvements acquired a right to be preferred in the acquisition of said lands from the United States, and under the law properly administered patent would have issued to him. (Record page 24.)

It will thus be seen that the commissioner of the general land office, without notice to Hyde, dismissed his contest regularly and orderly initiated pending before the local land office contrary to the rules, regulations and procedure of the Department and deprived him of his pre-emption right to the land in controversy. This action on the part of the commissioner was ex parte, and being without notice is not binding on the court. In United States vs. Steenerson 50 Fed. Rep. 510 it is said after defining the powers of the commissioner to supervise the action of the local land officers "But it is equally true

that such action of the commissioner, being practically ex parte, is not conclusive." In Orchard vs. Alexander, 157 U. S. 372, the Court says: "Of course this power of reviewing and setting aside the action of the local land officers is, as was decided in Cornelius vs. Kessel, 128 U. S. 456, not arbitrary and unlimited. It does not prevent judicial inquiry. Johnson vs. Towsley, 13 Wall. 72." This is the universal doctrine as laid down by the courts and by the Land Department.

Puget Mill Co. vs. Brown, 54 Fed., 991.
Brogan vs. Mtg. Co., 63 Fed., 192.
Risdon vs. Davenport, 57 N. W. R., 482.
Lewis vs. Shaw, 70 Fed. Rep., 293.
Winsor vs. McVay, 93 U. S., 272.
Stinson vs, Clark, 45 Fed. Rep., 760.
Perry vs. O'Hannon, 11 Mo., 373.
M. K. T. R. R. Co., vs. LaSalle, 14 L. D., 217.
Whitt vs. McGuirk, 6 L. D., 268.
Henyon vs. Green, 5 L. D., 684.
Abess vs. VanZee, 4 L. D., 488.
Hanson vs. Howe, 2 L. D., 222.
Winans vs. Miller, 4 L. D., 254.
Young vs. Hanson, 64 N. W. R., 654.
Parsons vs. Venzke, 61 N. W. R., 1036; 164 U. S., 89.
Pfund vs. Valley Loan & Trust Co., 72 N. W. R., 480.

In Hanson vs. Howe, 2 L. D., 221, it is said: "To permit the dismissal of a contest regularly initiated on motion of a stranger to the record without notice to the contestant and prior to the day of hear-

ing would be to adopt a rule contrary to all procedure in courts of law that would lead to great confusion in practice by this department, and effectively deprive the original contestant of his day in court." It appears from the facts alleged in the answer that the defendant has done everything he could do in the prosecution of his rights, and therefore is entitled to the same consideration he would be had everything been done which he attempted to do and which he was unlawfully prevented from doing.

As was said by Mr. Justice McLean in Lytle vs. Arkansas, 9 Howard, 374, "It is a well established principle, that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him." And again, "The claim of pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law it has no existence as a substantive right. But when covered by the law it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it."

Hyde had initiated a pre-emption right to the land by his settlement and application to file thereon and tender of the land office fees, and the actual filing of his declaratory statement so far as this land is concerned—the filing of his application and the endorsement thereon show that his declaratory statement as to this forty was accepted and his filing allowed. He thereby acquired "A right to be preferred in the purchase or other acquisition of the land."

Ard vs. Brandon, 156 U. S., 536.
Shipley vs. Cowan, 91 U. S., 330.
Roy vs. D. & I. R. R. Co., 173 U. S., 587.

This was a segregation of the land from the public domain, Lindville vs. Clearwater, 11 L. D., 356; Henry Miller, 14 L. D,, 242, and the recognition of his rights as a pre-emptor, Whitney vs. Taylor, 158 U. S., 85, and Warren should not have been allowed to select the land; but the local land officers allowed him to do so. Hyde then set up his claim to the land based on what he had done, and a hearing was ordered to determine which had the better right, he or Warren. In this case his rights as a pre-emptor were directly involved, and no reason is perceived why they were not regularly and in the ordinary course of procedure determined therein. Instead of allowing the case to proceed to trial the Commissioner arbitrarily and without notice revoked the order of hearing because of the decision of Secretary Vilas. If the decision is erroneous, this action on the part of the Commissioner was unwarranted, and all decisions made by the department based thereon are erroneous. Let us examine this decision and ascertain whether or not the Secretary in that case had power or authority to pass upon the pre-emption rights of the contestants, and if he had, was the conclusion reached by him warranted by the case before him?

All decisions heretofore made by the courts and Land Department and the dismissal of Hyde's contest by the Commissioner, were based on the decision of Secretary Vilas dated February 18th, 1889. If

this decision is erroneous, then all the decisions based thereon are such. We contend that the Secretary had no power to pass upon the pre-emption right of either Hyde or McDonald in their contests against Sioux half breed scrip locations. In the contests their rights as pre-emptors were not in issue.

"Express provision is made by the rules of practice for a contest before the land office and a regular formal trial," of which rules the Court will take judicial notice.

Caha vs. U. S. 152 U. S., 219; 38 L. Ed., 415.

The affidavit of contest determines the issues. The charges therein contained are the only ones the contestee is required to answer, and the testimony should be confined to such charges.

Schelter vs. Off, I. L. D. 113.
Shull vs. McCormick, I. L. D. 470.

Hyde attacked the *legality* of scrip location No. 19 D and McDonald of No. 19 E on the ground "That the scripee never made any improvements on the land either in person or by her agent or attorney," and that the scripee had not given Eaton a power of attorney or any authority to locate land with the scrip or to make any improvements or to erect buildings. (Record pages 16 and 17.)

In refutation of these charges Eaton filed in the local land office affidavits in support of the legality of the scrip locations, and copies of two powers of attorney purporting to have been executed by the scripee and her husband. (Record page 17.)

Here were the issues. It is true that as Secret-

ary Vilas says in his decision the affidavits of contest each set forth the qualification of the contestant to enter the land as pre-emptors, and that they had settled on the respective tracts of land and intended to file declaratory statements therefor, when the plat of survey should be filed. But this was nothing more than a compliance with the rule of the Commissioner of the general land office made May 28th, 1883, requiring contestants to set forth in the affidavit of contest their qualifications to enter the land. Certain it is that the statements in the affidavits of contest as to the qualifications of the contestant to enter the land that he had settled on the same after the location of the scrip, and that he intended to file a declaratory statement for the land when surveyed—would not be grounds for a contest under any circumstances. These facts would not and could not in any view of the case affect the validity of the scrip locations. They were not enough upon which to predicate any kind of a claim. It was not necessary to state in the affidavit of contest that the contestant intended to enter the land or that he was qualified to do so. The rule of the Commissioner in this respect had been changed. Lyman vs. Fayant, 4 L. D. 203; Charles Hotaling, 3 L. D. 17; Geisendorf vs. Jones, 4 L. D. 185; Lerne vs. Martin, 5 L. D. 259; Wazsizer vs. Kropitzky, 5 L. D. 296; Heartley vs. Ruberson, 11 L. D. 575; McGee vs. Ortley, 14 L. D. 523; Henyan vs. Green, 5 L. D. 684. True, when the land was surveyed Hyde applied to enter three forties covered by S. H. B. scrip with the forty in issue as a pre-emption, but this was an independent proceeding.

the decision of Secretary Smith of December 21, 1894 (19 L. D., p. 547), Appendix No. 4. From this decision it appears that under the operation of Secretary Vilas' decision the Sioux Half-Breed location was canceled; that notice of this action was received at the local land office and the land opened to filing February 23, 1889; that thereupon various parties filed conflicting applications to appropriate the land; that this conflict resulted in a hearing being ordered between the various claimants; that at this hearing an enormous mass of testimony was taken, the record being described by the Secretary as one of the most voluminous ever transmitted to the Department, and that the ultimate result of this proceeding was the Secretary's decision of December 21, 1894, now immediately under consideration.

The decision of Secretary Noble, dated November 12, 1892, referred to above, expressly held that, while the *pre-emption* claim of Hyde was *res adjudicata*, his claim to be recognized as a preferred claimant under the act of 1880 was not disposed of because not properly in order until he had made an application under that act. Under this reservation in Secretary Noble's decision of November 12, 1892, Hyde formally became a party to this new proceeding. He was recognized as such by the order for a hearing; he became formally a party by filing, April 2, 1891, a homestead application; he appeared at the trial and produced a large amount of testimony, relating to his settlement, residence, and cultivation, and he appealed from the adverse decision of the Register and Receiver. The Commissioner, considering this appeal, found, as matter of fact, that "voluminous testimony" was introduced on the question of the existence of the prohibited contract and that upon this additional testimony it was clearly and conclusively established that such a contract

was in existence, even if such fact did not appear in the original case pending before Secretary Vilas. This finding of the Commissioner was in the following words (Appendix No. 3):

"But even if this were otherwise, and the pre-emption claims were now the proper subject of consideration, I am entirely satisfied upon the evidence that the grounds upon which the two decisions referred to proceeded were well-founded in point of fact. Without attempting at length to discuss the voluminous testimony upon this particular point, I deem it sufficient to say that a careful consideration thereof satisfies me of the existence of an illegal and prohibited contract in respect to the lands claimed by these parties under the pre-emption law. The testimony in the case at bar clearly and conclusively establishes that fact, even if it did not satisfactorily appear in the proceeding resulting in the two decisions mentioned. I find from the testimony in the case at bar that the pre-emption claims of these parties were not initiated in good faith but were established under a written contract by the terms of which the title procured from the United States would enure, in part at least, to others than the claimants, and that for this reason, as found and determined by Secretaries Vilas and Noble, the claims are invalid and must upon their merits be rejected.

"I accordingly find and hold that the claims of these parties here presented are invalid and must be denied."

In deciding Hyde's appeal from this decision, Secretary Smith, in his decision of December 21, 1894, referring to Hyde's pre-emption claim, said (19 L. D., pp. 550, 551):

"The hearing was set for June 8, 1891. Prior to that date, however, viz., on April 2, 1891, Hyde made homestead application for lots 5 and 6, the S.E ¼ N.W. ¼ and N.E. ¼ S.W. ¼ of said section, claiming the same by virtue of his alleged preference right of entry, and by virtue of his settlement made on the last-named tract August 20,

1884, and his subsequent residence thereon. On the next day (April 3) McDonald made homestead application for the N.W. ¼ S.E. ¼ of said Sec. 30, claiming the same on the same grounds asserted by Hyde, viz: preference right of entry and settlement, residence and improvement.

"On the day of the hearing (June 8, 1891), Hyde filed a petition to amend his homestead application of April 2, 1891, by omitting therefrom the N.E. ¼ S.W. ¼ of said Sec. 30, asserting, however, that he did not intend thereby to abandon his claim to that tract, but he would at the proper time assert his claim thereto. His petition was allowed and the application amended as requested." * * *

"An appeal by the parties adversely affected by said decision brings the case to this Department. Taking them in the order presented at the trial and in the arguments and briefs of counsel, the first requiring consideration are the claims of Hyde and McDonald.

"At page 23 of their brief they declare that 'they do not claim the land in controversy by virtue of any settlement or pre-emption rights,' and at the bottom of page 24 of said brief they assert that 'the question of these pre-emption rights is not in the case.' Notwithstanding these statements, however, there is in the record (1) their homestead applications, containing, as stated, an express claim to these lands by virtue of settlement thereon August 20, 1884, and subsequent residence and improvement; (2) a great amount of testimony with reference to said settlement, residence, and improvement, said settlement, etc., being the same on which they based their pre-emption right to said lands.

"If there ever was a question to which the doctrine of *res judicata* applied it is that of the settlement and pre-emption rights of McDonald and Hyde to the lands embraced in Orille Stram controversy, a part of which is included in their homestead application of April 2 and 3, 1891.

"There must of necessity be somewhere an end to controversy. Their settlement and pre-emption rights to these lands involved in the controversy concerning the Sioux half-breed scrip locations of Orille Stram were fully con-

sidered, and finally determined by the Department adversely to them in its decision February 18, 1889, *supra*, and in its review of that decision January 28, 1891 (12 L. D. 157), and the introduction into the record of this case of the evidence referred to cannot resurrect and revitalize that dead issue."

And, with reference to the claimed right of preference under the act of 1880, the Secretary said:

"In your office letter 'H' of March 13, 1891, directing a hearing, it was stated, with reference to Hyde and McDonald, that—

> 'should they set up any claim as preferred contestants in regard to lots 5 and 6 and S.E. ¼ of N.W. ¼ and N.W. ¼ of S.E. ¼ of said Section 30, you will allow them full opportunity at the hearing directed herein to present their testimony and be heard with others.'

"This clearly limited the inquiry, so far as they were concerned, to their 'claim as preferred contestants' as to their alleged preferred right to enter the land described in said office letter 'H.' The local office so treated it, and in its decision denied them a preference right to enter said lands, holding, as stated, that they are not contestants under the act of May 14, 1880. Your office, on appeal, affirmed the decision of the local office in that respect, and their appeal here from your office decision brings before me for consideration, so far as they are concerned, that single question and none other.

"To entitle them to a preference right of entry it must appear that their action against the Stram scrip locations was a contest under the act of May 14, 1880.

"The proceedings against the Stram scrip locations were separately instituted by Hyde and McDonald on October 9, 1884. At that time the lands were unsurveyed. The papers or pleadings by which the proceedings were begun are, with the exception of names and description, identical. After averring the invalidity of the scrip locations, each pleader proceeds in the exact language of the law to state his qualifications as a pre-emptor. He then states the date

of his settlement on said land, that it was made with a view of inhabiting and cultivating it for his own exclusive use and benefit, and that as soon as the township plat was filed in the local office, at Duluth, he intended to file his pre-emption declaratory statement for said land.

"It will at once be seen that those pleadings asserted the superiority of the pre-emptor's title over that of the scrip locator, that it brought the two titles squarely in conflict, necessitating a judgment as to which was the better. And that the litigation following was a contest between conflicting claims. There is no intimation in the pleadings themselves that the proceedings are instituted under the act of May 14, 1880, and they certainly bear no resemblance whatever to the familiar affidavits of contest under that act. It is shown by the evidence in this case that on the trial of that case before the local office, a question as to who should pay the Land Office fees arose, and that the suggestion was made that McDonald and Hyde, as the contestants, should pay the fees. Thereupon their attorney declared that the proceedings were not contests under the act of May 14, 1880, but contests between conflicting claims, and hence not within the rule requiring the contestant to pay all of the Land Office fees, but that the fees should be apportioned between the parties, each paying their own fees, and that the matter was adjusted in that way.

"Again, it is apparent that if those proceedings were instituted by Hyde and McDonald for the purpose of securing a preference right of entry to the lands covered by the scrip locations, they would have exercised that right within thirty days from the date of notice of the decision of February 18, 1889. But, instead of that, they each filed a motion to review and reverse that opinion, and thereby assumed a position utterly inconsistent on the part of intelligent persons, seeking a preference right to enter the lands involved in that controversy. Their every act has been that of persons consistently endeavoring to assert and establish their title under the pre emption laws, and, incidentally, to clear from the record the Orille Stram scrip locations, which were, in effect, a cloud on their pre-emption title.

"The claim of a preference right to enter these lands as

successful contestants evidently was an afterthought that came to them when casting about for some means by which to extricate themselves from the wreck in which the decision of February 18, 1889, involved them.

"There is no theory presented by this case, in any of its manifold aspects, by or under which the status of Hyde and McDonald, in the controversy with Orille Stram *et al.*, could be construed to be that of contestants under the act of May 14, 1880. And the decision of your office, rejecting their applications to enter the lands embraced in their respective homestead applications and denying them a preference right to enter the same, as alleged successful contestants, is in that respect hereby affirmed."

April 12, 1895, this decision of Secretary Smith, absolutely disposing of both claims of Hyde, was affirmed upon motion for review. (20 L. D., 324.)

It is thus seen that the entire claim of Hyde, both as a pre-emptor and as a preferred claimant, has been fully and exhaustively considered by the Land Department in proceedings to which he was a party and upon evidence and affidavits which he himself submitted.

As to his pre-emption claim, two of these decisions, by two different Secretaries, reject the same and declare it illegal upon testimony formally submitted at a hearing before the Register and Receiver; and to this is to be added a third decision, by the Commissioner of the General Land Office, to the same effect, upon other and additional testimony taken at another hearing, in a different case. And to all this must be superadded five other decisions of the Secretary of the Interior, declaring all questions as to Hyde's right under the pre emption law *res adjudicata* under the first two decisions mentioned.

As to his claim of preference right under the act of 1880, two decisions have found it to be entirely without validity and untenable and have rejected the same.

These various adjudications by the Interior Department were all decisions in matters of fact as contradistinguished from conclusions of law. They involved the exercise of the judgment conferred by law upon the Secretary of the Interior in the necessary determination of facts antecedent to the issue of a patent for the land.

As to the pre-emption claim, the question presented and decided was whether Hyde had entered into a certain contract under which his title, if perfected, would inure in part to others than himself. That was a question of fact. The determination of the question depended upon testimony. If he had actually executed a paper of that particular character, he was within the prohibition of the statute. Whether or not he had executed such a paper depended upon testimony. In determining this question, upon evidence, the Secretary necessarily determined a question of fact and not of law. At the very best, however, for the plaintiff in error, the question was one of mixed law and fact. The mental process by which the question was solved might have been one of two kinds. The Secretary may have first looked to the provisions of the statute, observed what was there obviously and plainly prohibited, and then looked to the evidence to determine whether a paper of that particular kind had been executed by Hyde. Or, the Secretary may have first ascertained the facts surrounding the transaction, whether Hyde had executed a paper and what were its terms, and then looked to the statute to discover whether such a paper was prohibited by the law. We submit that by either of these processes the ultimate determination was one of fact; but, in any event, it was a question of mixed law and fact in which the line between the determination of law and that of fact is imperceptible except to the judicial mind operating upon the subject. For ex-

ample:—The general laws of the United States do not permit the appropriation of land by a foreigner. The claimant must be a citizen or have declared his intention to become such. The Secretary must determine from an inspection of the naturalization certificate whether it is in proper form and sufficient to authenticate the fact. This is in the nature of a conclusion of law, yet it would obviously be a determination of fact within the numerous decisions of this court refusing to disturb a decision of the Secretary defining the qualifications of a settler.

As to preference right under act of 1880, the question was absolutely and entirely one of fact. Such a claim preferred by Hyde to be valid necessarily depended upon the ascertainment of many pre-existing circumstances. These facts were all found against Hyde by the Secretary in his decision. He found that the steps necessary to put a contestant in position to assert such a claim had not been taken; that Hyde, from the evidence before him, as a matter of fact, never intended to have his contest so treated, and, finally, that as matter of fact, Hyde had not paid the fees of the Register and Receiver, required by the act as a prerequisite to the assertion of such a claim.

Under these circumstances the aggregated decisions of the Department against the validity of any claim on the part of Hyde in and to the premises are clearly conclusive. This court has over and over again decided this proposition in many similar cases, and were it not for the unequivocal position taken by adverse counsel in the case, to the effect that to remedy an injustice this court will review findings of fact made by the Land Department, we would consider a reference to the cases not only unnecessary, but perhaps unpardonable.

With this claim on the part of our adversaries for an apology, we invite attention to the more recent adjudications of this court upon the subject.

Wherever a special tribunal of any character has been endowed with jurisdiction to hear and determine certain facts as preliminary to a conveyance of land or the investiture of title, the determination of those facts by said tribunal in the absence of fraud is final and conclusive upon the courts.

United States *v.* Arredondo, 6 Pets. 691.
Wright *v.* Roseberry, 121 U. S. 488, 500, 501.
Craigin *v.* Powell, 128 U. S. 691, 698, 699.
United States *v.* Cal., etc., Land Co., 148 U. S. 31, 43, 44.
Barden *v.* N. P. R.R. Co., 154 U. S. 288, 327, 330, 331.
McCormick *v.* Hayes, 159 U. S. 332.

In United States *v.* Cal. &c. Co. (*supra*), this general doctrine is thus announced by Mr. Justice Brewer (p. 43):

"Now, it is familiar law that when jurisdiction is delegated to any officer or tribunal, his or its determination is conclusive. Thus in the case of United States *v.* Arredondo, 6 Pet. 691, 729, this court said: 'It is a universal principle that, where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive (1

Cranch, 170, 171), legislative (4 Wheat. 423; 2 Pet. 412; 4 Pet. 563); judicial, (11 Mass. 227; 11 S. & R. 429; adopted in 2 Pet. 167, 168), or special (20 Johns, 739, 740; 2 Dow P. C. 521, etc.), unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law.'"

And that the decision of the Land Department made upon a question of fact in a contested case within its jurisdiction is conclusive upon the judiciary, has been settled by repeated decisions of this court.

Johnson *v.* Towsley, 13 Wall., 72, 83, 84, 86, 87.
Warren *v.* Van Brunt, 19 Wall., 646, 652, 653.
Shepley *v.* Cowan, 91 U. S., 330, 339, 340.
Moore *v.* Robbins, 96 U. S., 530, 533, 535.
Marques *v.* Frisbie, 101 U. S., 473, 475, 476.
Vance *v.* Burbank, 101 U. S., 514, 519.
Smelting Co. *v.* Kemp, 104 U. S., 636, 647.
Quinby *v.* Conlan, 104 U. S., 420, 425, 426.
Steel *v.* Smelting Co., 106 U. S., 447, 450, 451.
Baldwin *v.* Stark, 107 U. S., 463.
U. S. *v.* Minor, 114 U. S., 233, 243.
Lee *v.* Johnson, 116 U. S., 48.
Heath *v.* Wallace, 138 U. S., 573, 580, 585.
Sanford *v.* Sanford, 139 U. S., 642, 647.
Knight *v.* Land Association, 142 U. S., 161, 177, 178.
Carr *v.* Fife, 156 U. S., 494, 498, 500, 501.
Catholic Bishop, etc., *v.* Gibbon, 158 U. S., 155, 166.
Burfenning *v.* C. St. P. M. & O. R.R., 163 U. S., 321, 323.
Gonzales *v.* French, 164 U. S., 338, 342.
Beley *v.* Napthaley, 169 U. S., 353, 356, 362, 363.
Johnson *v.* Drew, 171 U. S., 93, 99.
Calhoun *v.* Violet, 173 U. S., 60, 63.

See also, to the same effect:

Telephone Co. *v.* U. S., 68 Fed., 542, 569.
U. S. *v.* Winona & St. P. R.R., 67 Fed., 948, 955, 956.
Diller *v.* Hawley, 81 Fed., 651.
U. S. *v.* N. P. R.R. Co., 95 Fed., 864.
U. S. *v.* Steenerson, 50 Fed., 504, 508, 509.
Puget Mill Co. *v.* Brown, 54 Fed., 987, 991.

In Shepley *v.* Cowan (91 U. S. 330, 339, 340), speaking to this question, the court, by Mr. Justice Brewer, said:

"If the matter were open for our consideration, we might, perhaps, doubt as to the sufficiency of the proofs presented by the heirs of Chartrand to the officers of the Land Department to establish a right of pre-emption by virtue of the settlement and proceedings of their ancestor, or by virtue of their own settlement. Those proofs were, however, considered sufficient by the Register of the local land office, by the Commissioner of the General Land Office on appeal from the Register, and by the Secretary of the Interior on appeal from the Commissioner. There is no evidence of any fraud or imposition practised upon them, or that they erred in the construction of any law applicable to the case. It is only contended that they erred in their deductions from the proofs presented; and for errors of that kind, where the parties interested had notice of the proceedings before the Land Department, and were permitted to contest the same, as in the present case, the courts can furnish no remedy. The officers of the Land Department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practised upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, for mere errors of judgment upon the weight of evi-

dence in a contested case before them, the only remedy is by appeal from one officer to another of the Department, and, perhaps, under special circumstances, to the President."

In Steel *v.* Smelting Co. (106 U. S. 447, 450, 451), the court, by Mr. Justice Field, thus announced the doctrine:

"We have so often had occasion to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that Department, overlook our decisions on the subject. That Department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

In Gonzales *v.* French (164 U. S. 338, 342, *supra*), as late as 1896, the court, by Mr. Justice Shiras, thus stated the crystallized rule:

"As the claim of the plaintiff in error to the land in question was passed upon by the proper local officers of the Land Department, and subsequently, upon appeal, by the Commissioner of the General Land Office, and, upon a further appeal, by the Secretary of the Interior, and as the result of the contest was the granting of a patent to the probate judge of the county of Yavapai as trustee of the inhabitants of the town of Flagstaff, the plaintiff, to main-

tain her bill, must aver and prove either that the Land Department erred in the construction of the law applicable to the case, or that fraud was practiced upon its officers, or that they themselves were chargeable with fraudulent practices. Johnson *v.* Towsley, 13 Wall. 72; Moore *v.* Robbins, 96 U. S. 530; Steel *v.* Smelting Co., 106 U. S. 447."

In Johnson *v.* Drew (171 U. S. 93, 99) the court, by Mr. Justice Brewer, said:

"Whether a party was or was not in possession of a particular tract at a given time is a question of fact, depending upon parol testimony; and if there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this court, it is that the decision of the Land Department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts."

In Calhoun *v.* Violet (173 U. S. 60, 63), at the last term of the court, the altogether familiar doctrine is announced, by Mr. Justice White, as follows:

"It is elementary that, although this court will determine for itself the correctness of legal propositions upon which the Land Department of the Government may have rested its decisions, it will not, in the absence of fraud, re-examine a question of pure fact, but will consider itself bound by the facts as decided by the Land Department in the due course of regular proceedings, had in the lawful administration of the public lands."

Baldwin *v.* Stark (107 U. S., 463, *supra*), which came to this court by writ of error to the Supreme Court of the State of Nebraska, was an original bill filed for the purpose of enjoining the grantee of one Van Pelt, to whom a patent had been issued, from prosecuting a suit of eject-

ment for the premises in controversy. The case was tried in the State court upon the record of the proceedings before the Land Office, including the evidence upon which the patent was issued, and the transcript in this court showed that all questions involved were decided by the Department in favor of the complainant, except one, which was that he was disqualified under the pre-emption law, because of the fact that he had previously exercised another pre-emption right. The record showed that this particular question was much contested before the Land Department and much testimony taken thereon. The Supreme Court of the State assumed jurisdiction of the question and held that the Land Department had decided the question erroneously, and by writ of error this decision was brought to this court for review. In disposing of the case, this court, by Mr. Justice Miller, reversed the judgment below, holding that the question whether Stark had at any time previously exercised the pre-emption right was one of fact and concluded by the departmental decision. In its opinion the court said (p. 455):

"It has been so repeatedly decided in this court, in cases of this character, that the Land Department is a tribunal appointed by Congress to decide questions like this, and when finally decided by the officers of that Department the decision is conclusive everywhere else as regards all questions of fact, that it is useless to consider the point further. Where fraud or imposition has been practised on the party interested, or on the officers of the law, or where these latter have clearly mistaken the law of the case as applicable to the facts, courts of equity may give relief; but they are not authorized to re-examine into a mere question of fact dependent on conflicting evidence, and to review the weight which those officers attached to such evidence. Johnson *v.* Towsley, 13 Wall. 72; Gibson *v.* Chouteau, *id.* 92; Shepley *v.* Cowan, 91 U. S. 330; Marquez *v.* Frisbie, 101 *id.* 473."

Heath *v.* Wallace (138 U. S. 585; *supra*), was an action in ejectment reaching this court upon error to the Supreme Court of the State of California. The plaintiff claimed through the State under the swamp-land grant of 1850 as confirmed, in California, by the special act of July 23, 1866. The defendant claimed under a patent which had been issued to him upon a pre-emption claim. The claim of title in the plaintiff rested upon the assertion that, under the operation of the two swamp acts, land which had been returned by the surveyor as "subject to periodical overflow" was "swamp and overflowed" within the meaning of the said acts. The direct question presented in this court was whether an adjudication by the Interior Department that these terms were not synonymous and that the land in question, described as above, was not swamp and overflowed, was final and conclusive. The court so held, and in expressing its opinion upon that question Mr. Justice Lamar, speaking for the court, said:

"At any rate, the question whether or not lands returned as 'subject to periodical overflow' are within the descriptive terms of those granted by the swamp-land act—that is, whether they are 'swamp and overflowed'—is a question of fact properly determinable by the Land Department. It is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of that department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts of the country. Johnson *v.* Towsley, 13 Wall. 72; Smelting Company *v.* Kemp, 104 U. S. 636; Steel *v.* Smelting Co., 106 U. S. 447; United States *v.* Minor, 114 U. S. 233, and many other cases. We are of opinion, therefore, that the decision of the Land Department on a question of the actual physical character of certain lands is not subject to review by the courts. And that consideration is sufficient to dispose of the first assignment of error against the plaintiff in error."

Beley *v.* Naphtaley (169 U. S. 353, *supra*) was a suit in ejectment coming to this court from the Circuit Court of the United States for the District of California. The plaintiff claimed title through a patent issued under the 7th section of the special act of Congress of July 23, 1866 (14 Stat. 218, 220), confirming to purchasers "in good faith" lands formerly covered by Mexican grants which had been rejected and where the lands so purchased had been excluded from the final survey of such grant. The defendants made no pretence of title emanating from the United States, but relied upon possession and the claim that the patent upon which the plaintiff relied was not valid under said act, because, among other reasons, the purchaser to whom the patent issued was not a purchaser "in good faith." This claim was based upon the fact that the purchase had been made twenty years after the claim had been rejected by the Board of Commissioners appointed under the act of 1851, to adjudicate such claims, eighteen years after it had been rejected by the District Court and thirteen years after rejection by the Supreme Court of the United States. The Department had considered and overruled these objections prior to the issue of the patent. In deciding this question as thus presented this court sustained the patent and, in announcing its opinion, by Mr. Justice Peckham, said (p. 363):

"We do not think the facts thus stated show, as matter of law, that Millet could not have been a *bona fide* purchaser of these lands for a valuable consideration. And whether in fact he were such *bona fide* purchaser was a question to be determined by the Government on issuing the patent, and an enquiry into that question of fact is precluded by the patent itself."

Lee *v.* Johnson (116 U. S., p. 48, *supra*) is a case peculiarly persuasive, if not absolutely conclusive, in the case at

bar. It was a suit in equity, coming to this court in error to the Circuit Court of Emmet County, State of Michigan. The defendant in the court below, Lee, held under a patent of the United States issued to him under the homestead laws, and suit was brought to charge him as trustee, and to compel a conveyance to the plaintiff, Johnson. The latter claimed an equitable title founded upon certain facts which, he claimed, established such an equity. He had entered the land under the homestead laws and had thereafter so connected himself with the fract by occupancy, residence, cultivation, etc., as to entitle him, as he claimed, to a patent. While so holding the land, contest was brought against him by Lee for abandonment, under the provisions of Section 2297 R. S., U. S., which section authorized such a contest upon charge of abandonment of a homestead entry for six months at any one time. This contest was heard in the usual manner in the Land Department, and resulted eventually in a decision by the Secretary of the Interior under which the entry of Johnson was canceled. Whereupon, Lee entered the land under the homestead laws and procured the patent against which the complaint was directed. From the foregoing recital, it will be seen that all of the facts connected with the homestead claim of Johnson were considered and decided by the Department, and also the question whether, as so found, such facts in law constituted a valid claim, or whether, under such facts, the claim was invalid and should be canceled. It was claimed before the Land Department, on the part of Johnson, upon the facts established, that he, Johnson, had made his original entry in good faith for his own benefit; that his residence was a sufficient compliance with the law, and that he had not abandoned the land. Upon the other hand, these conclusions, as applied to the evidence, were disputed by Lee. After ascertaining the facts, it became necessary for the

Secretary to apply the law of the case in his ultimate conclusion. In other words, the question before the Secretary was a mixed one of law and fact, to a much greater degree than the one involved in the question at bar. In deciding the case, this court sustained the patent issued to Lee upon the grounds that these findings by the Secretary of the Interior, preceding the issue of said patent, were binding and conclusive upon the court. In thus deciding the case, the court, by Mr. Justice Field, said:

"The court does not interfere with the title of a patentee when the alleged mistake relates to a matter of fact, concerning which those officers may have drawn wrong conclusions from the testimony. A judicial inquiry as to the correctness of such conclusions would encroach upon a jurisdiction which Congress has devolved exclusively upon the Department. It is only when fraud and imposition have prevented the unsuccessful party in a contest from fully presenting his case, or the officers from fully considering it, that a court will look into the evidence."

* * * * * * *

"Without going into any detail of the evidence presented to the Commissioner and the Secretary of the Interior, but taking the general statement of its nature, which we have given, it is clear that their attention was drawn by it to the character of the settlement of Johnson, and that they considered whether his entry was made to acquire a home for himself or for his son-in-law, whether his residence had been sufficiently personal and continuous to save and perfect any right, if in fact he had ever initiated any, and whether or not he had abandoned the land. The findings of the Secretary upon any of these matters must be taken as conclusive, in the absence of any fraud and imposition such as we have mentioned. Upon this point it is only necessary to refer to the cases where this conclusive character of the action of the Department upon matters of fact cognizable by it has been expressly affirmed. Johnson *v.* Towsley, 13 Wall., 72; Shepley *v.* Cowan, 91 U. S., 330, 340; Moore *v.* Robbins, 96 U. S., 530, 535; Quinby *v.* Conlan, 104 U.

S., 420, 426; Smelting Co. *v.* Kemp, 104 U. S., 636, 640; Steel *v.* Smelting Co., 106 U. S. 447, 450."

Diller *v.* Hawley (81 Fed. 651, *supra*) is a case peculiarly applicable to that at bar, although the facts at bar are very much stronger to prove bad faith on the part of Hyde. In that case the final entry of one Hackley, under the timber and stone act of 1878, with eleven other similar entries, was canceled by the Commissioner of the General Land Office on the ground that it was made for the benefit of another. This cancellation was made after a hearing ordered by the Department, in which, however, none of the entrymen were sworn and in which there was no direct testimony that any of them had made any contract to enter land for the benefit of another. The testimony was entirely circumstantial, or, more correctly speaking, inferential, viz., that immediately upon entry they conveyed to one Bailey; that Bailey had induced them to make the locations, and that the claimants were by occupation and business other than those who would naturally have taken up such claims. From these circumstances, the Department found that the entries were not made in good faith; such entries were canceled, and the land was subsequently patented to others. The case turned, in this connection, upon the question whether the decision of the Land Department, resulting in the cancellation of these entries, was a *finding of fact.* The court consisted of Circuit Judges Gilbert and Ross and District Judge Hawley. The court held that the decision of the Department, holding that Hackley had acquired the land for speculative purposes and not in good faith, was a *question of fact,* which was conclusive upon the court. Judge Hawley, in delivering the opinion upon this point, said:

"In the administration and disposition of the public lands the decisions of the Land Department upon the questions of fact are deemed conclusive. It is only questions of law that are reviewable in the courts. Bishop of Nesqually *v.* Gibbon, 158 U. S. 165, 166; 15 Sup. Ct. 779, and numerous authorities there cited. The Secretary of the Interior found as a fact that the entry was made by Hackley 'for the purpose of acquiring the land for speculative purposes'; that the entry was not made 'in good faith, in harmony with the spirit and letter of the law.'"

Without attempting to cover, by a summary, all of the points decided in the above-cited cases, bearing upon the general question here under discussion, we invite attention to the fact that this court, in such authorities, has applied the principle of conclusiveness to all questions involving:

(*a*) The weight of evidence.

Shepley *v.* Cowan, 91 U. S. 340.
Baldwin *v.* Stark, 107 U. S. 465.
Sanford *v.* Sanford, 139 U. S. 642, 647.
Lee *v.* Johnson, 116 U. S. 49.
Quinby *v.* Conlan, 104 U. S. 425.

(*b*) The qualification of the settler as ascertained by applying law to established facts.

Steel *v.* Smelting Co., 106 U. S. 447, 451.
Baldwin *v.* Stark, 107 U. S. 463.

(*c*) The question of good faith, arising as a conclusion from established facts.

Beley *v.* Naphtaley, 169 U. S. 353, 356, 362, 363.
Lee *v.* Johnson, 116 U. S. 51.

Even if the question involved before the Secretary of the Interior in his adjudication against Hyde was a mixed question of law and fact (which we deny under the authorities

above cited), nevertheless the Departmental decisions therein would be conclusive upon this court.

Marquis *v.* Frisbie, 101 U. S. 473, 476.
Quinby *v.* Conlan, 104 U. S. 420, 425.

Marquis *v.* Frisbie (101 U. S. 437, *supra*) was a suit arising in the courts of the State of California, by petition of the plaintiff, Marquis, against Frisbie, the defendant, setting forth several reasons why a decision of the Secretary of the Interior against the pre-emption claim of said Marquis and in favor of Frisbie was erroneous, and praying a decree declaring the plaintiff to be the equitable owner. The grounds upon which the complaint was based were, first, that the Land Department mistook the law of the case and, second, that its decision was obtained by fraud. A demurrer to this petition was affirmed by the courts below and the case reached this court upon writ of error. In deciding the case, this court affirmed the judgment of the courts below upon both of the questions involved, and upon the first of such questions, whether the Land Department had mistaken the law of the case, the court, in its opinion, by Mr. Justice Miller, said (p. 476):

"As we have already said, the argument of counsel is that the bill which was demurred to makes a case of mistake and of fraud and imposition within the meaning of these decisions.

"Let us inquire first into the alleged mistake of law by the Land Department.

"The language of this court in Moore *v.* Robbins, cited above, is that equity will interfere 'when it is *clear* that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another.'

"This means, and it is a sound principle, that where there is a mixed question of law and of fact, and the court cannot so separate it as to see clearly where the mistake of law is,

the decision of the tribunal to which the law has confided the matter is conclusive.

"But if it can be made entirely plain to a court of equity that on facts about which there is no dispute, or no reasonable doubt, those officers have, by a mistake of the law, deprived a man of his right, it will give relief."

Quinby *v.* Conlan (104 U. S., p. 420, *supra*) was an action in ejectment arising in the State of California, which reached this court in error to the Supreme Court of that State. The answer of the defendant was a denial of the declaration in ejectment followed by a special count by way of cross-complaint setting up an equitable defense. This equitable defense consisted of alleged erroneous rulings of the Land Department upon two matters: First, the possession and improvement of the lands by the parties claiming a pre-emption right to them; second, an ascertainment of the time when, in law, a portion of the lands in controversy formerly within the claimed limits of the Mexican grant were, by survey, segregated from such Mexican grant and opened to settlement and pre-emption. The case reached this court with the question before it whether the decision of the Department upon these two questions was final and conclusive. This court so held and in rendering such, its decision, by Mr. Justice Field, said:

"But independently of this conclusion there is a general answer to the alleged erroneous rulings of the officers of the Land Department as grounds for the interference of the court. Those rulings were upon mere matters of fact, or *upon mixed questions of law and fact*, which were properly cognizable and determinable by the officers of that Department.

"The laws of the United States prescribe with particularity the manner in which portions of the public domain may be acquired by settlers. They require personal settlement upon the lands desired and their inhabitation and im-

provement, and a declaration of the settler's acts and purposes to be made in the proper office of the district, within a limited time after the public surveys have been extended over the lands. By them a land department has been created to supervise all the various steps required for the acquisition of the title of the Government. Its officers are required to receive, consider, and pass upon the proofs furnished as to the alleged settlements upon the lands, and their improvement, when pre-emption rights are claimed, and, in case of conflicting claims to the same tract, to hear the contesting parties. The proofs offered in compliance with the law are to be presented, in the first instance, to the officers of the district where the land is situated, and from their decision an appeal lies to the Commissioner of the General Land Office, and from him to the Secretary of the Interior. For mere errors of judgment as to the weight of evidence on these subjects, by any of the subordinate officers, the only remedy is by an appeal to his superior of the Department. The courts cannot exercise any direct appellate jurisdiction over the rulings of those officers or of their superior in the Department in such matters, nor can they reverse or correct them in a collateral proceeding between private parties. * * *

"It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the courts over the action of the numerous officers of the Land Department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the Department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practised, necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled. Johnson *v.* Towsley, 13 Wall. 72; Shepley *v.* Cowan, 91 U. S. 332–340; Moore *v.* Robbins, 96 *id.* 530."

In answer to our contention as to finality in the Secretary's decision, counsel for plaintiff in error cite the following cases, which they claim to be authority for their proposition that, in cases where injustice has been done, this court will inquire into *facts*, as well as law, notwithstanding a decision by the Land Department.

Cunningham *v.* Ashley, 14 How., 377.
Barnard *v.* Ashley, 18 How., 43.
Lytle *v.* Arkansas, 22 How., 193.
Lindsey *v.* Hawes, 2 Black., 554.
State *v.* Batchelder, 1 Wall., 109.
Railroad Company *v.* Smith, 9 Wall., 95.
Shepley *v.* Cowan, 91 U. S., 330.
Moore *v.* Robbins, 96 U. S., 530.
Stewart *v.* McHarry, 159 U. S., 643.

The slightest reference to these cases will show that in the main they have no application whatever to the case at bar and that in none of them is the doctrine contended for by opposing counsel declared or announced.

The first four of said cases,—Cunningham *v.* Ashley, Barnard *v.* Ashley, Lindsey *v.* Hawes, and Lytle *v.* Arkansas, were all cases which arose in this court not later than the December Term, 1862, before the present doctrine on this subject had become well established by repeated decisions of the court. All of these four cases involved questions arising upon *ex-parte* proofs, only, in pre-emption cases, where the pre-emption title thus initated came in conflict with other titles asserted under the laws of the United States, where there was no notice of the pre-emption proceedings and where there was never, at any time, any trial had between the parties, or other adversary proceedings. Still further, most, if not all, of the pre-emption rights involved were initiated or perfected prior to the act

of July 4, 1836, under which appellate jurisdiction was first conferred upon the Commissioner of the General Land Office and the Secretary of the Interior. And in the last-mentioned case the charge against the pre-emption entry involved fraud,—one of the exceptions to the general rule. It is obvious, therefore, that none of these cases are authority for the proposition of counsel.

As to the remaining five cases cited, not one of them, even inferentially, sustains the contention of our adversaries.

State *v.* Batchelder (1 Wall. 115) the only one of the authorities from which counsel make any quotation, was a suit in ejectment coming to this court from the Supreme Court of the State of Minnesota. The title of the plaintiff was based upon the school grant made to the territory of Minnesota, of sections 16 and 36. The title upon which the defendant made his defence was a patent issued upon a pre-emption claim to two persons, the grantors of the defendant. To this defence, the plaintiff, by replication, alleged that the patent had been obtained by fraud and misrepresentation as to compliance made with law by the pre-emption claimants in respect to settlement, residence, and improvement. The proceedings upon the issue of the patent were entirely *ex-parte* and no trial was ever had between the parties. The court below held that the decision of the Department prior to the issuance of the patent was conclusive upon the court. This court, upon the appeal, reversed the decision of the court below, expressly, however, upon consideration of the fact that the proceedings upon the issue of the patent were entirely *ex-parte*. Counsel for plaintiff in error, in their brief, quote only a portion of the language of the court upon this question. The entire language of the court (p. 115) is as follows:

"These questions have been so often before this court, and were so fully considered in the last case (Lindsey *et al.* *v.* Hawes *et al.*), where the authorities are collected, that it would be a waste of time to re-examine them.

"A court of equity will look into the proceedings before the Register and Receiver, and even into those of the Land Office or other offices, where the right of property of the party is involved, and correct errors of law or of fact to his prejudice. The proceedings are *ex-parte* and summary before these officers, and no notice is contemplated or provided for by the pre-emption laws as to parties holding adverse interests, nor do they contemplate a litigation of the right between the applicant for a pre-emption claim with a third party. The question as contemplated is between the settler and the Government, and if a compliance with the conditions is shown to the satisfaction of the officers, the patent certificate is granted."

Railroad Company *v.* Smith (9 Wall. 95) involved nothing more than the question whether parol testimony was admissible to determine the character of the land as swamp and overflowed or otherwise at the date of the Swamp Land grant, and neither involved, nor in its decision reached, the question here under discussion.

In Shepley *v.* Cowan (91 U. S. 330) we have hereinbefore cited and quoted the precise language of the court, wherein the doctrine for which we contend was specifically and plainly announced.

In Moore *v.* Robbins (96 U. S. 530, 535) the court, instead of sustaining the contention of our adversaries, after citing and reaffirming Johnson *v.* Towsley, 13 Wall. 72, and Shepley *v.* Cowan, 91 U. S. 340, thus announced the well-known doctrine:

"The decision of the officers of the Land Department made within the scope of their authority on questions of this kind, is, in general, conclusive everywhere, except when reconsidered by way of appeal within that Department; and

that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in a court of justice when the title afterwards comes in question."

In Stewart *v.* McHarry (159 U. S. 643) the court, instead of holding that it would review facts previously determined by the Department, declares exactly to the contrary in the following words (p. 650):

"The Supreme Court held that Stewart's ownership and title were sufficient to entitle him to an additional farm homestead, and that the Land Department erred as matter of law in its conclusion in regard thereto, but that in respect of Stewart's residence on the land conveyed to him by his wife, that was a question of fact, and the court had no jurisdiction to re-examine the conclusions of the Land Department thereon in the absence of a clear showing that the decision was procured by fraud or imposition which did not appear in the case. With these views we concur."

Upon the foregoing considerations, we confidently submit that there can be, at this date, no debatable question respecting the conclusiveness of judgments by the Land Department upon questions of fact rendered in contested cases within its jurisdiction; that the case at bar is one of precisely that character, and that for this reason alone the decree of the court below sustaining the demurrers to plaintiff's cross-petition must be affirmed.

To avoid the inevitable result of the foregoing conclusion counsel for plaintiff in error advance the following propositions by way of excepting the case at bar from the operation of the general rule:

First. That the pre-emption claim of Hyde was not involved in any issue made in the case which resulted in the cancelation of the Sioux Half-Breed scrip location, and that

for this reason the action of Secretary Vilas and Secretary Noble in that case, upon that question, was mere *obiter*.

Second. That the testimony given in said case by Hyde, McDonald, and White was improperly considered by Secretaries Vilas and Noble as applicable to the pre-emption claim of Hyde.

Third. That Hyde's contest against the Warren scrip location was dismissed without notice to said Hyde, and that the decisions of the Department relative to his position in the case as a preferred claimant are not binding upon the court.

We notice each of these propositions in the order above stated.

First.

That the Pre-emption Claim was not in Issue.

Answering this claim on the part of our adversaries, we submit the following counter propositions:

(*a*) As a matter of fact this exact question was put in issue by the pleading.

(*b*) Even if this be otherwise, still the Secretary of the Interior with the testimony before him had jurisdiction to decide the pre-emption claim of Hyde, and it was his duty under the law to so proceed.

(*a*) The condition of this question, as shown by the pleadings, fully appears by the recitation of facts in the decision of Secretary Vilas of February 18, 1889 (Appendix No. 1), and the decision of Secretary Smith of December 21, 1894 (Appendix No. 4). From these recitations, which are, of course, as findings of fact, conclusive upon Hyde, it appears that the application of Hyde filed October 9, 1884, asking to be allowed to contest the Sioux Half-Breed location, as a material part thereof and as part of his case,

affirmatively set up and pleaded his pre-emption claim and his right to the land thereunder; that, so pleading and so showing himself to be entitled, he averred that he was possessed of all the necessary qualifications essential to a pre-emption claim; that he had theretofore made a settlement upon the land with a view to pre-emption; that he intended to make a declaratory statement of the same under the pre-emption law as soon as the land was surveyed, and that he thereupon, and upon the grounds stated, asked that a day be set for a hearing. Attached to this application to contest was a verification of the facts therein alleged. It further appears that upon the 20th day of July, 1885, as soon as the land was surveyed, Hyde, in conformity to the notice given in his application to contest, applied at the local land office to file a declaratory statement, which was rejected, so far as the land involved in the Sioux Half-Breed location was concerned, by the Register and Receiver, on the ground of such prior appropriation; that Hyde appealed from this decision; that such appeal was transmitted to the General Land Office August 25, 1885, and that November 14, 1885, the Commissioner, upon consideration of the papers then before him, namely, the application to contest and the appeal from the decision rejecting Hyde's declaratory statement, ordered a hearing. This letter of the Commissioner ordering a hearing was, in part, as follows:

"In view of the conflicting statements respecting the legality of these locations, I deem it proper that a hearing should be had, that the respective parties may have an opportunity to submit such proof as they may have *in support of their allegations*, and that this office may be possessed *of all the facts possible in the matter*."

It still further appears from the recitations of these decisions that under this order of the Commissioner a hearing

was had, at which it was assumed by all parties, including the plaintiff in error, that the pre-emption rights of Hyde and McDonald were involved; that voluminous testimony was taken not only with respect to the rights of the scrip locators, but also with respect to the rights of the pre-emptors; that upon the conclusion of such hearing the Register and Receiver held the scrip locations to be valid; that in view of this finding they held it to be unnecessary to pass upon the *bona fides* of Hyde and McDonald in respect to their rights under the pre-emption law; that thereupon Hyde appealed from said decision to the Commissioner of the General Land Office; that the decision of the Commissioner was adverse to the scrip locations and held the same for cancellation, but without making any direct disposition of the pre-emption claims; that thereupon the scrip claimants appealed to the Secretary of the Interior, and that with this appeal all the papers hereinbefore referred to, including the appeals of Hyde and McDonald from the decision of the Register and Receiver, were transmitted to the Secretary for his consideration. The findings and conclusions of Secretaries Vilas and Noble upon the question as to whether these pleadings made an issue before them involving the validity of the pre-emption claims, we have already set out in full in this brief. Both Secretaries held and decided that under the practice of the Department these pleadings raised such an issue, and that upon the same it was the duty of the Department to dispose of the pre-emption claims.

We submit that by these proceedings Hyde voluntarily and in strict legal form put his pre-emption claim, so far as it had then progressed, before the Department for adjudication. So far as a contest under the act of May 14, 1880, was concerned, the assertion of his pre-emption claim was

not an essential element. As we have heretofore pointed out, a contestant under the provisions of that act need not necessarily have any connection at all with the title. He may be an entire stranger to the paramount source of title, and his contest may be, and almost always is, conducted solely with the expectation of making use of the thirty days' preference right awarded in case of successful result. When, therefore, Hyde, instead of adopting the usual and ordinary form of contest under the act of 1880, filed an application averring his own connection with the paramount source of title, he necessarily excluded the idea of a contest under the act of 1880 and put himself within the other class of contestants in which the respective claims of individuals are arrayed against each other for disposition by the Department.

It is claimed by counsel in their brief (page 21) that the averment of Hyde's qualifications as a pre-emptor in his application to contest was nothing more than a compliance with "a rule of the Commissioner of the General Land Office made May 28, 1883," which had been subsequently changed; and eight departmental decisions are cited as showing such revocation.

No reference is given to show where the "rule" thus invoked can be found and no mention of the same is made in any of the cases cited, which cases, however, all positively hold that no such averment of qualifications is necessary in commencing a contest to secure a cancellation. By diligent search through the land literature of that period, however, we find, in a Secretary's decision not among those cited by counsel, a statement that upon the date mentioned, May 28, 1883, the Commissioner addressed a letter to the Register and Receiver at Huron, Dakota, directing those officers to require a contestant to file with his application proof of his qualifications to make an entry. This was not

a general letter to all the offices; there is no suggestion, even, that any such letter ever went to the Duluth office, and the Huron letter was specifically overruled by the Secretary a year before Hyde commenced his contest. (Bailey *v.* Olson, 2 L. D. 40, 41, Nov. 10, 1883; see, also, Koons *v.* Elsner, 2 L. D. 66, April 15, 1884.) The decision of Secretary Teller, in Bailey *v.* Olson, was as follows:

"The application to contest was denied, however, not as generally insufficient, but for the reason that Bailey had not complied with your instructions to the district officers at Huron, of date May 28, 1883, requiring a contestant to file with his allegations of contest an application to enter the land, together with proof of his qualifications to make entry, as an earnest of his intention to claim the benefit of the preference right accorded by the act of May 14, 1880 (21 Stat. 140).

"In my judgment, this was not good reason. There is nothing in that act providing for the initiation of contest, the whole law on that subject being embraced in Sec. 2297 of the Revised Statutes. The preference right allowed is to be exercised by making entry within thirty days from notice of cancellation, and not by a pre liminary application. This Department cannot make legislative requirements, nor can it superadd thereto, except to make regulations not inconsistent therewith for carrying into effect the provisions of the law. Now, this provision is a mere privilege, which the contestant may waive even after notice; and, consequently, no obligation can be imposed upon him at the inception of the contest to avail himself of its beneficial grant. He may take or refuse to take the land at his pleasure.

"I do not find that you have issued this instruction to the land offices generally, nor is there any record in the case showing that it had been given to the Aberdeen office, so far as my examination of the papers goes. But possibly you have not transmitted the order for my information."

With great respect for the learned counsel for plaintiff in error, we submit that a casual letter written by the Com-

missioner to Huron, Dakota, and not published, expressly overruled by a Secretary's decision, published in the usual manner, a year prior to Hyde's contest, can hardly be said to have impelled him to affirmatively plead his pre-emption claim against the Sioux Half-Breed location.

There has never been, so far as we can ascertain, any law, rule, or requirement of the kind specified, except in the single instance of contests under section 3 of the timber-culture act of June 14, 1878 (20 Stat., 114). That act provided for forfeiture of an entry for failure to comply with certain requirements, the land in such case to be thereafter "subject to entry under the homestead laws or by some other party under the provisions of this act." It was for a short time held, under this exceptional provision, that the contestant was required, with his affidavit of contest, to file an application to enter the land under one of the statutes mentioned. (Bundy *v.* Livingston, 1 L. D., 152; Circular of December 20, 1882, 1 L. D., 651.) This ruling, however, even as applied to that act, was always doubted, and was shortly thereafter overruled. (General Circular of June 27, 1887, 6 L. D., 284.)

The fact, therefore, that in commencing a proceeding against the Sioux Half-Breed scrip, Hyde adopted the usual form for an averment of a pre-emption claim, shows not only that he in form became a contestant in the class where different rights under the paramount source of title are put in comparison but, further, that such was his deliberate purpose and intent.

Another consideration leads to exactly the same conclusion. If Hyde was intending to initiate a claim merely under the act of 1880 and did not intend to put his pre-

emption right in issue, his allegation of the same was not only entirely unnecessary but also the most preposterous mistake of pleading. He cannot be assumed to have so pleaded for no purpose at all, and inasmuch as he was not required to so plead in the proceeding under the act of 1880, it must be that the course adopted was intended to at least bring before the Department such an equitable claim in himself as would have force and weight in determining the other issue as to cancellation of the prior Sioux Half-Breed location.

As to the effect to be given, in departmental pleadings, to such an application, there can be no possible question. Although cases in the Department, under the rules of practice, are intended to present or raise certain specific questions for decision, yet it has been invariably held from the earliest date that wherever, upon all the papers as presented, any particular question was raised or suggested, that question was within the power of the Department to decide. In all these cases, as has been repeatedly held by this court and by the Department itself, the Secretary of the Interior acts in a dual capacity. He is, in the first instance, a special tribunal to decide between the rights of the conflicting claimants. He is also the guardian of the interests of the United States, and bound by the law, no matter in what form the pleadings may appear, to protect the interests of the Government and prevent the consummation of any act prohibited by the policy of the public land laws.

In addition, it is to be borne in mind that, until Hyde was driven by the necessity arising from the cancellation of his claim, he never even intimated that his pre-emption claim was not in issue. From the very start until that date, as found by the Secretary, all parties connected with

the case proceeded upon the assumption that the preemption claim was involved in the issues and that it could be passed upon by the departmental officers.

(*b*) This question, however, has been directly passed upon by the Department and this court and must be considered, under these adjudications, as settled in favor of the jurisdiction of the Land Department in cases where upon the testimony action seems to be required even though the specific questions are not involved in technical issues.

The position of the Land Department upon this question is undoubted. It has been therein settled by a long and unbroken line of decisions by the Secretary of the Interior that it is the duty of that officer to cancel an entry or reject a claim whenever, in a contest before him, facts calling for such action appear, no matter how such facts are disclosed and without any reference whatever to the issues made between the parties.

Smith *v.* Brandes, 2 L. D., 95.
Condon *v.* Arnold, 2 L. D., 97.
Dayton *v.* Hause, 4 L. D., 263.
Litten *v.* Altimus, 4 L. D., 512.
Taylor *v.* Huffman, 5 L. D., 40.
Rue *v.* Faribault, 5 L. D., 260.
Burnett *v.* Crow, 5 L. D., 372.
Hegranes *v.* Londen, 5 L. D., 386.
Roe *v.* Schang, 5 L. D., 395.
Van Ostrom *v.* Young, 6 L. D., 25, 27.
Austin *v.* Thomas, 6 L. D., 330.
Overton *v.* Hoskins, 7 L. D., 394.
W. L. Rynerson, 7 L. D., 177.
Saunders *v.* Baldwin, 9 L. D., 391, 392.
Russell *v.* Gerold, 10 L. D., 19, 20.
Wells *v.* Hewitt, 11 L. D., 166.

Stenoien *v.* N. P. R.R. Co., 12 L. D., 495.
Ashwell *v.* Honey, 13 L. D., 121.
Carter *v.* Griffith, 13 L. D., 437.
Taylor *v.* Rogers, 14 L. D., 194, 195.
Alexander *v.* Hamlin, 17 L. D., 452.
Butler *v.* Geer, 18 L. D., 233.
Betts *v.* Shumaker, 21 L. D., 461, 462.
Moores *v.* Sommer, 22 L. D., 217, 221.
Seixas *v.* Glazier, 26 L. D., 49, 52, 53.

And the decisions of this court are equally plain and explicit.

Knight *v.* U. S. L. Assn., 142 U. S. 161.
Lee *v.* Johnson, 116 U. S. 48.
See Coppell *v.* Hall, 7 Wall. 542.
Oscanyan *v.* Arms Co., 103 U. S. 261.

In Knight *v.* U.S. Land Association (142 U. S. 161,177), speaking to this question and referring to section 441 of the Revised Statutes, conferring upon the Secretary of the Interior supervision over the disposition of the public lands, this court, by Mr. Justice Lamar, said:

"The phrase, 'under the direction of the Secretary of the Interior,' as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the Government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the Government to do justice to all claimants and preserve the rights of the people of the United States. As

was said by the Secretary of the Interior on the application for the recall and cancellation of the patent in this pueblo case (5 Land Dec. 494): 'The statutes, in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the Department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to the rights of the public and of private parties. Such supervision may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the Department the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice.'"

In Lee *v.* Johnson (116 U. S. 48, 51, 52) this very question directly arose and was directly decided. In disposing of it the court, speaking by Mr. Justice Field, said:

"The Supreme Court of Michigan held the decision of the Secretary of the Interior inconclusive, because it was not upon a point in issue between the contestants, stating that the question was that of abandonment, which only was inquired into by the register, or could be considered on appeal; that the jurisdiction of the Secretary, if he disposed of the case finally on other grounds, was not appellate but original, and that this had not been conferred; that the register on the hearing and the Commissioner on appeal had decided that the plaintiff had not abandoned the land, and upon that ground there was no reversal of the decision. It, therefore, held that the plaintiff was entitled to the relief prayed.

"While there are no formal pleadings in such cases, it is undoubtedly true, as a general rule, that in contested matters before the Land Department, as in those before the

courts, the decision should be confined to the questions raised by the allegations of the respective parties; but this rule has its exceptions. If in any case it appears from the evidence that the claim of the complaining or moving party is against public policy or the law, so that in no event could he recover a final judgment or decision, whatever be the nature or extent of the testimony upon the point at issue, the tribunal should not hesitate to dismiss the suit or the proceeding."

We accordingly, upon the particular question now under consideration, submit: first, that the question of the validity of the pre-emption claim of Hyde was directly put in issue, and as so put in issue was pending before Secretaries Vilas and Noble upon the appeal in the original case; and, second, and that whether this be so or not, these Secretaries, under the supervisory power conferred upon them by law, had full jurisdiction, and it was their duty to decide the question presented by the evidence, to declare these pre-emption claims invalid, and, so far as they had progressed, necessarily subject to cancellation.

Second.

That the testimony was improperly applied.

The contention of the plaintiff in error is that the testimony upon which Secretary Vilas decided the pre-emption claim to be invalid, was not pending before him in the case of Hyde—that is to say, it was not so pending for any purposes affecting such pre-emption claim. The proposition is that such testimony was before the Department in the McDonald case but not in that of Hyde. This, in effect, is the whole contention upon this point.

The facts upon which this contention rests, as hereinbefore recited in our statement, are as follows:

Hyde presented an application to contest a portion of the Sioux Half-Breed scrip location with scrip No. 19 D. (Tr., p. 16.) McDonald, at the same time, filed an application to contest the residue of the land covered by the scrip location with No. 19 E. (Tr., p. 17.) These applications were identical in form and allegations. (Secretary Vilas' decision of February 18, 1889, Appendix No. 1.) Each of these applications being rejected, Hyde and McDonald, respectively, appealed to the Commissioner. The order of the Commissioner directing a hearing treated the applications and appeals, thus as aforesaid identical in form and effect, as forming practically one proceeding; and, so proceeding, ordered a hearing therein precisely as though the proceedings were all taken in one and the same case. (Tr., pp. 25, 26.) The notices to Hyde and McDonald, respectively, were necessarily, from the very nature of the situation, separate and distinct, although the same day was fixed in each for appearance and trial. (Tr., pp. 26, 27.) Subsequently, Hyde and McDonald, represented by the same counsel, appeared on the same day, the 6th day of April, 1886, and the cases proceeded exactly as though they had been formally consolidated and were to be tried as one. Inasmuch as the allegations as to settlement and residence of the respective pre-emption claimants were distinct and separate subjects of consideration, one of the two necessarily preceded the other in the order of taking testimony. It appears from all the papers that the McDonald case was first taken up and testimony, both on behalf of the contestant, McDonald, and on behalf of the scrip claimants, was taken at great length. Whereupon, evidently to save time and expense in repeating the testimony, all the parties, including the scrip claimants and Hyde and McDonald, entered into a stipulation, of record in the proceedings, which was as follows:

"It is hereby stipulated and agreed upon that this testimony shall be considered in determining the validity of both locations of scrip 19 D. and 19 E."

Upon testimony thus taken and stipulated for, the Register and Receiver proceeded to decide all the claims presented. Determining, however, that the Sioux Half-Breed scrip location was valid, the local officers found no necessity, as they expressly state, for passing upon the pre-emption claims of Hyde and McDonald. The Commissioner, reviewing this decision, reversed the Register and Receiver and held the scrip location invalid, making no disposition of the pre-emption claims. The appeal by the scrip claimant took all the papers in the record to the Secretary's office, which officer, considering and deciding upon all the claims, just as did the Register and Receiver, determined from the testimony that the pre-emption claims were invalid.

We invite the attention of the court to the fact that nowhere, in the course of all the proceedings before the Interior Department, in all of the cases we have recited, and in all of the decisions mentioned, was this contention now relied upon in this court ever raised or presented to the Department. It was persistently asserted that the pre-emption claims were *not in issue*, but in no single instance, in all of the cases, so far as we can discover, was there any suggestion made that the entire testimony taken upon the point in question did not embrace both Hyde and McDonald if such testimony was properly in the case for any purpose. In other words, prior to the filing of the cross-petition in the case at bar, it seems to have been assumed upon all sides that the stipulation in question was subject to but one construction, viz., that it carried into the case the whole of the testimony and made the same applicable to Hyde as well as McDonald.

That this stipulation was intended to carry into the case

the entire testimony which up to that time had been taken, so as to make the same applicable to all parties to the controversy, must, upon the slightest reflection, be conceded.

To determine the real meaning and effect of the stipulation consideration must, of course, be given to the situation to which it was intended to apply. The cases had come on for hearing under the order of the Commissioner and the notice given by the Register and Receiver at the same hour of the same day. So far as the allegations against the scrip locations are concerned, the charges were identical, and testimony to support one would support the other. The parties were represented by the same counsel. Testimony was first taken on behalf of the contestants in an attempt to show the invalidity of the scrip locations. Just exactly why, or under what circumstances, the contestants Hyde and McDonald and their attorney White came upon the stand is not disclosed by the record, further than that they must have been called on behalf of the contestants. This will appear by reference to the Transcript, pages 18 and 19, where the testimony of these witnesses purports to be set out in full in the cross-petition. As to McDonald's evidence, the record shows: first, some "testimony" of McDonald; second, a "redirect examination" obviously in the interest of the contestants; third, a "cross-examination" obviously in the interest of the scrip claimants. This order of examination necessarily indicates that the damaging testimony came out in a cross examination of the witness after he had been placed on the stand in his own behalf to establish the pre-emption claim in himself, which he had affirmatively pleaded. This being so, the fair presumption is that the testimony of Hyde and White was brought out under similar circumstances. When, therefore, the testimony in respect to one of the claims was concluded and it was then stipulated that what had been taken

should go into the case as applied to both, it must have been intended that this cross-examination, developing these particular facts, was to go in with the rest. Otherwise the court is seriously asked to believe that the Sioux Half-Breed scrip claimant agreed that the testimony of these witnesses should go in against him, *without the benefit of the cross-examination.* This consideration alone reduces the proposition of our opponents to absurdity. Such could never have been the united understanding of the parties.

Another consideration leads to precisely the same result, so far as the obvious intent of the parties is concerned. The scrip claimant could well and very advantageously have consented to the application of all the testimony, including this cross-examination, to his entire location; for he may well have reasoned, as it afterwards resulted, that such testimony demonstrated the absolute illegality of the claim which was set up against him, in which event all that was necessary for him to do to make perfect defence would be to show that the questions of law raised upon the facts against his scrip locations were without merit. It was undoubtedly the advantage which he was to have from the effect of this testimony which induced him to enter into the stipulation.

Another consideration is equally conclusive. The entire record shows that the attack made upon the Sioux Half-Breed scrip locations was all in one and the same interest, either Hyde and McDonald acting in common for the benefit of their respective claims, or, as undoubtedly appears from the evidence in the case, these two persons acting in the interest of some third party. Whichever of these two ways it was, the movement was a common one; the same counsel represented the united movement, and every step taken in one case was identical with a similar step taken in the other.

Is it possible that counsel, representing two claimants, in exactly the same way, in substantially the same proceeding, by this stipulation intended to put, or in fact put, one of his clients in a better position than the other?

But, however this may be, it is entirely clear that in such a proceeding as this in the Land Department the Secretary of the Interior would, in the exercise of his supervisory jurisdiction, be entirely at liberty and undoubtedly be required by his duty, under the authorities we have hereinbefore cited, to reject the claim of Hyde under the circumstances stated, even though Hyde were not technically a party to the McDonald proceeding, and even though he had not intended to stipulate such testimony into the case. Hyde stood before the Register and Receiver in exactly the position of McDonald. He had the same adverse complaint against the scrip location. He had come into the office of the Register and Receiver in answer to precisely the same summons at precisely the same hour. He was there represented by the same counsel. He heard in that case the damaging testimony which showed his claim to be illegal. Still further, he actually went upon the stand, in the McDonald case, and testified upon that point. This left him in the position of one who stood silently by while testimony was given, including his own, showing his claim to be invalid, without attempting to make any defence in the premises. Under such circumstances he would be clearly estopped, especially in proceedings before the Land Department, to deny the legal force and effect of that testimony as against himself. He could in no sense be considered as a person whose claim was being investigated and rejected without an opportunity for defence.

In Vance *v.* Burbank (101 U. S. 519, 520), speaking of such a situation, this court, by Chief Justice Waite, said:

"It has also been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the Department, so that it may properly be said there has never been a decision in a real contest about the subject-matter of inquiry. False testimony, or forged documents even, are not enough, if the disputed matter has actually been presented to or considered by the appropriate tribunal. (*United States* v. *Throckmorton*, 98 U. S. 61; *Marquez* v. *Frisbie*, *supra*.) The decision of the proper officers of the Department is in the nature of a judicial determination of the matter in dispute.

"The operative allegation in this bill is of false testimony only. That testimony Scott had full opportunity of meeting. Rehearings were granted him when the case seemed to require it, and he took all the appeals the law gave. The last decision was given by the highest Department officer. If the evidence he presented to the register and receiver was not all considered on these appeals, it was clearly his own fault. It was more than six years from the time his first appeal was taken before the final hearing was had. No fraud is charged on the register and receiver, or on the heirs of Perkins in respect to the keeping back of the evidence. If any was in fact not sent forward, and Scott did not discover the omission until within one year of the time of the commencement of this suit, he must have been grossly neglectful of his own interests. He does not now state what the omitted evidence was, or that it was anything more than cumulative. The extent of his averment is that it strongly supported his claim in the contest. For we all know, the other evidence might have been equally strong, and might have covered the whole ground.

"As to the alleged fraud in the description of the compromise line, it is sufficient to say that, according to the bill, this fraud, if it in fact existed, was discovered long before the contest in the Land Department, and if it had any importance in the case the amplest opportunity was given to show the error and get relief against the agreement. This was one of the matters that might have been pre-

sented to the Land Department, and, therefore, is concluded by the decision of that tribunal."

We have already shown, under the authority of this court, that in this class of cases it is the duty of the Secretary of the Interior to enforce the law as against contracts of this kind contrary to its policy, wherever and however the information upon which he must proceed comes before him, subject only to the qualification that the party accused shall have had a fair chance to make defense. Even if all that is claimed as to the intention of Hyde in making this stipulation be true, he nevertheless is in the position of one who had ample opportunity to defend his claim against this testimony and failed to do so. The damaging facts were not established by adversary witnesses, but by the testimony of McDonald, his associate, of White his counsel, and of himself.

In addition, and as a most important consideration, the court will remember that nowhere, from the beginning to the end of the record, has the plaintiff in error ever denied the making of the contract in question or that it has always been and is now in full force and effect. The cross-petition covers thirteen pages of the printed transcript and undertakes to state the equitable defense with the utmost particularity. Yet, as before stated, there is nowhere in it any allegation or averment that a contract, of the kind described in the Secretaries' decisions, was not in fact made and is not now in existence.

Counsel for plaintiff in error at one or more places in their brief refer to the allegation of the cross-petition averring that the stipulation was intended for the purpose only of determining the validity of the scrip location and treat this allegation as though it were an averment of fact which would be admitted by the demurrer. This is obviously an

incorrect assumption. The only averment in the record, which is conceded by the demurrer, is the fact that the stipulation in the words above quoted was entered into between the parties. For what purpose it was admitted, and what the effect of it was when admitted, are questions which the defendant below cannot settle by mere averments.

In view of the foregoing considerations we submit: first, that the stipulation legally carried into the case, as against Hyde, all the testimony taken, including that quoted in the cross-petition; second, that even if this stipulation were not so intended, yet nevertheless the testimony in question having reached the Interior Department in a proceeding to which Hyde was practically if not technically a party and wherein he had full opportunity to submit a defence, it was the duty of the Secretary, under his supervisory power, to pass upon the claim.

Third.

The dismissal of Hyde's contest.

The claim in this connection asserted on the part of the plaintiff in error is that he made a valid application to contest the Warren Chippewa scrip location for the premises in controversy; that, upon such an application, a hearing was ordered; that subsequently this order for hearing was revoked and set aside by the Commissioner without notice to Hyde, and that all this deprived him of his pre-emption right to the land in controversy. The proposition of counsel, in this regard, as found in their brief (page 16) is as follows, the italics being our own:

"It will thus be seen that the Commissioner of the General Land Office, *without notice to Hyde*, dismissed his contest regularly and orderly initiated, pending before the

local land office, *contrary to the rules, regulations, and procedure of the Department*, and deprived him of his pre-emption right to the land in controversy."

The facts as shown by the record, upon this claim as founded, will be remembered as follows:

April 15, 1885, the land in question being then entirely open and free from claim, so far as the records of the local land office were concerned, and absolutely free except for the application to file declaratory statement by Hyde and his appeal to the Commissioner, said papers being then in Washington, Warren made entry of the land by the location thereon of his right of selection conferred by the treaty of 1854.

April 10, 1886, Hyde filed an application to contest this location of Warren, then by record covering the land, upon the ground that he, Hyde, had a prior, valid pre-emption right under his settlement made, as alleged, in 1884. (Tr., p. 16.) This application to contest so filed by Hyde, it will be observed, was four days after the date of the trial of his contest against the Sioux Half-Breed scrip location, in which the testimony relative to the invalidity of his pre-emption claim had been given and while the same yet remained unacted upon by the Register and Receiver. It will be carefully noted that this contest was, beyond all question, one brought, not under the act of 1880, but as one of the other class of contests where an alleged superior right was set up against the claim or right of the contestee. Presumably, the papers in connection with this application were, in due time, forwarded to the Commissioner of the General Land Office.

December 22, 1888, over two years and one-half after the tender of this application at the local land office, the Commissioner, in a letter to the Register and Receiver,

ordered a hearing between the parties. (Tr., p. 16.) No copy of this order is pleaded and no information upon that point is in any other way exhibited to the court. A simple comparison of dates hereinbefore recited shows that, during the time intervening between the tender of this application and the above-noted action thereon by the Commissioner, the other and prior contest by Hyde against the Sioux Half-Breed scrip location of Eaton had passed the office of the Register and Receiver and of the Commissioner and was *then pending before Secretary Vilas upon appeal.* In other words, upon the date when the Commissioner ordered this hearing upon Hyde's application, Hyde's entire pre-emption claim, upon which alone the application to contest was based, was pending before Secretary Vilas upon the voluminous testimony taken in the prior case and was there awaiting such disposition as that officer should make of the matter. It is apparent, therefore, that the order in the first instance was unadvisedly and improvidently issued.

February 18, 1889, within sixty days after this order of the Commissioner granting Hyde a hearing upon his application, Secretary Vilas rendered the decision to which reference has already so many times been made, declaring the pre-emption claim of Hyde to be in violation of law and cancelling all record of the same so far as it had progressed.

March 8, 1889, eighteen days after this decision of Secretary Vilas cancelling Hyde's pre-emption claim, and fifteen days after the land involved in that case had been restored to the public domain at the local land office, the Commissioner revoked his prior order, made two years and a half previous, granting Hyde a hearing against Warren. This was obviously done in execution of the decision made by Secretary Vilas. Hyde claimed nothing under his application to contest except a right founded upon his pre-emption claim; that claim had been specifically re-

jected and cancelled by Secretary Vilas, and the decision of the Secretary had been fully executed by directions to the local land office save only with respect to this pending matter by Hyde against the Warren title. To clear the records of his office and to conform to the decision of his superior the Commissioner was required to revoke, and properly did revoke, the previous order for a hearing.

July 6, 1889, Hyde filed in the General Land Office a motion to reinstate his contest, which, as would appear by the allegations of the cross-petition, has never been formally acted upon. It is claimed on behalf of the plaintiff in error that the order of revocation made by the Commissioner March 8, 1889, was "without notice" to Hyde, and that for this reason the various decisions of the Department rejecting his preference right are not conclusive upon the courts.

It is somewhat difficult, as heretofore indicated, to at all times correctly understand the position of the plaintiff in error in respect to his claim of a preference right, which, upon his part, is supposed to arise from these various proceedings. At one time it would appear to be a preference right based solely upon a contest founded upon his preemption claim; at others, as a supposed preference right arising under the act of 1880. For the purposes of the present question, we discuss the claim as by possibility arising in both ways, premising however that a mere preemption settlement and filing do not, as contended by counsel, constitute an appropriation of public land.

N. P. R.R. Co. *v.* Colburn, 164 U. S 383.

Treated as an ordinary contest, brought upon a senior right or claim and not as a contest under the act of 1880, we answer the claim of counsel by the following counter propositions:

(*a*) The revocation order of March 8, 1889, was merely a ministerial act on the part of the Commissioner, in respect to which no notice to Hyde, either before or after the fact, was necessary. It was simply a clerical execution of the decision of the Secretary, his superior officer. No notice of such action was required or indeed would have been appropriate. Hyde could not have been heard upon the question if notice had been given him. If the Commissioner had formally notified him that he was about to put the decision of the Secretary into execution, the only opposition which Hyde could have submitted would have been a suggestion that the decision of the Secretary was erroneous. The only paper which Hyde had before the Commissioner was a contest based upon his pre-emption claim. That pre-emption claim had been rejected by the Secretary. Surely Hyde could not have been heard before the Commissioner by way of asking that officer to review or to refuse to execute the decision of his superior. Hence, there was no necessity for notice to him of the action contemplated, and he could have been deprived of no possible remedy or right by not having received such notice.

(*b*) As a matter of fact, Hyde had actual notice of the decision of Secretary Vilas, under which the revocation order was made, for, within the thirty days allowed by the Rules of Practice, he filed with the Secretary a motion for review of such decision. (Sec'y Noble's decision, January 28, 1891, Appendix No. 2.) In other words, Hyde, at the date of the Commissioner's order of revocation, or within a few days thereafter, had actually pending before the Secretary of the Interior a motion for review of the latter's decision of February 18, 1889, which motion raised every question in the case before the Secretary which Hyde could possibly have raised, even in an irregular and improper manner, before the Commissioner. He was, obviously,

relying upon the validity of his pre-emption claim and he was asserting his rights thereto, in the proper place for their assertion, to wit, the office of the Secretary, and not the office of the Commissioner, his subordinate.

(*c*) Hyde had actual notice of the revocation order itself very shortly after it was made. This is shown by his motion to reinstate his contest filed July 6, 1889. This was done, however, while his motion for review of Secretary's Vilas' decision was actually pending before his successor, Secretary Noble. In other words, the entire contention of the plaintiff in error, so far as the revocation of this order for hearing is concerned, is obviously without a particle of merit. The order itself was purely ministerial; it could not, from its very nature, have deprived him of any right or remedy which he had, and, as matter of fact, did not deny him any such right or work him any injury whatsoever. Upon the contrary, he actually asserted every right and followed every remedy which he could have asserted before the Commissioner, and more also, in his proceeding before the Secretary.

(*d*) Secretary Noble's subsequent decision, made January 28, 1891, disposed of the whole matter. That decision overruled Hyde's motion for review, which motion, as before stated, presented every question which could have been presented to the Commissioner, by any possibility, in respect to the revocation order. It was in practical effect not only an affirmation of the order of the Commissioner revoking the order for hearing, but also a denial of the motion to reinstate filed by Hyde. There was thereafter no necessity for any further action by the Commissioner of the General Land Office and, as suggested by the Supreme Court of the State in its opinion (Tr., p. 44), it would be "somewhat remarkable if the Commissioner should act upon a motion to set aside an order made by the Secretary, his superior officer."

It is true that the Commissioner might, in a formal way, have denied the motion for reinstatement filed by Hyde, but had he done so, or should he now do so, it is entirely clear that Hyde would be entitled to no appeal or other remedy. It is equally clear that non-action by the Commissioner on this motion has in no way prejudiced the claim of Hyde, however the same may be now asserted.

Treated as a contest under the act of May 14, 1880, the claim of counsel for plaintiff in error in respect to this order of revocation is equally untenable. The Commissioner's letter of March 13, 1891, ordering a hearing as between the claimants who sought to make entry of the land after the cancellation of the Sioux Half-Breed location, expressly reserved to Hyde full right, in that proceeding, to assert any claim which he had, or claimed to have, under the act of 1880. He became a party to that proceeding, under such order, and throughout its entire progress was recognized as a party and given full opportunity to be heard in respect to his preference right. He appeared and submitted voluminous testimony in this regard, and his claim of preference right thus presented after full hearing was also rejected by Secretary Smith in his decision of December 21, 1894 (App. No. 4, 19 L. D., 551 to 553), and again upon review, April 12, 1895 (20 L. D. 324).

Aside from the consideration that these two last-mentioned decisions were entirely upon matters of fact and therefore conclusive, we submit that the action taken by the Secretary was without error, because:

(*a*) The pleadings themselves, as hereinbefore stated, showed that the contest as initiated and carried on was based solely and entirely upon the assertion of the preemption claim, and was not, either in form or substance, under the act of 1880.

(*b*) No attempt was made by Hyde to exercise the preference right of entry within thirty days after notice to him of the Secretary's decision of February 18, 1889, cancelling the Sioux Half-Breed scrip location. Had he been prosecuting a contest under the act of 1880, such proceeding would have been necessary in order to preserve his rights. Instead of so proceeding, he filed the motion for review of Secretary Vilas' decision, thus again asserting his preemption instead of a preference right.

(*c*) Hyde did not pay, or offer to pay, the land-office fees required by the act of 1880 before a claimant can be considered as a contestant thereunder. The statute in question is one of forfeiture and undoubtedly to be strictly construed. A contestant setting up any claim under it must, assuredly, bring himself within a strict compliance of its literal terms. If it was intended to here set up, as a part of the alleged equity of the plaintiff in error, any right under the act of 1880, the cross-petition should have formally alleged all the facts necessary to have brought Hyde within the terms of that act, including the fact that he had paid the land-office fees and had *thus* procured the cancellation of the Warren location, or had become entitled to such cancellation, or at least had acquired the right to try that question. No such averments are found in the cross-petition. The condition is absolutely mandatory, and without the averment of compliance no equity can possibly be founded upon this statute.

Still further, it affirmatively appears, as a matter of fact, within the pleadings, that the necessary fees under this statute were not paid by Hyde as a contestant. (Secy. Smith's decision of Dec. 21, 1894, App. No. 4, 19 L. D., p. 552.)

(*d*) The provisions of the second section of the act of 1880 do not embrace, within the scope of their operation,

any appropriation of the public lands except pre-emption, homestead, and timber-culture entries; the Warren location upon the premises in controversy was not within either of these enumerated classes, and the same was not, therefore, subject to contest, in any event, under said act.

We assert with absolute confidence that this statute, being one of forfeiture, is to be strictly construed; that it embraces and can be extended only to the specific cases or classes of cases enumerated therein; that a location or selection of land like that made by Warren is not within these enumerated classes, and that for these reasons the plaintiff in error cannot, under any circumstances, be admitted to any claim or pretension of claim under this statute.

At the date of the passage of this act the laws relating to the disposition of the public domain had become an established system well understood and defined. This system provided, by different laws, many and various methods in which title to the public domain might pass to individuals. By some of these laws the transfer of title was known as an *entry;* by other laws it was known as a *selection;* by still other laws it was known as a *location;* by still other statutes it was known and designated as a *grant.* Without wearying the court with unnecessary detail, or with extended reference to the statutes, and without even attempting to cover the entire field, we call attention to the fact that at the date of the act of 1880 the following, among many other laws, existed under which titles were made:

1. Private entries (so called) for cash, having origin in the very earliest statutes relating to public lands.
2. Locations with bounty land warrants, having origin in statutes at least a half a century old.
3. Locations with New Madrid certificates under act of February 17, 1825 (14 Stat. 211), and amendments.

4. Pre-emption entries under act of September 4, 1841 (5 Stat. 455), and amendments.

5. Sioux Half-Breed scrip locations under act of July 17, 1854 (10 Stat. 304).

6. Chippewa Mixed-Blood selections under treaty of September 30, 1854 (10 Stat. 1109), being the treaty under which Warren located the premises in controversy.

7. Porterfield scrip locations under act of April 11, 1860 (12 Stat. 836).

8. Homestead entries under act of May 20, 1862 (12 Stat. 392), and amendments.

9. Agricultural College scrip locations under act of July 2, 1862 (12 Stat. 503), and amendments.

10. Private land scrip locations under act of June 22, 1860 (12 Stat. 85), and amendments.

11. Townsite entries under act of July 1, 1864 (13 Stat. 343), and subsequent acts.

12. Mineral-land entries under act of July 26, 1866 (14 Stat. 251), and amendments.

13. Valentine scrip locations under act of April 5, 1872 (17 Stat. 649).

14. Coal-land entries under act of March 3, 1873 (17 Stat. 607).

15. Desert-land entries under act of March 3, 1877 (19 Stat. 377), and amendments.

16. Timber-culture entries under act of June 14, 1878 (20 Stat. 113), and amendments.

17. Timber and stone land entries under act of June 3, 1878 (20 Stat. 89), and amendments.

18. Disposal of Indian lands under various special and varying statutes.

19. Various acts granting lands to the several States for internal improvement, including the university grant, the school grant of particular sections, and the swamp-land grant, all vesting, in greater or less degree, by a location or selection.

With full knowledge of this situation, to wit, that under scores of different statutes titles to public lands had been and were being initiated and perfected under varying and

different names, as "entries," "locations," "selections," and the like, Congress passed the act in question. The language used must, of course, be construed as applied to this situation. So read, it will be observed that, in a general statute, relating to other subjects in respect to which the legislation was extremely liberal, Congress inserted a section of *forfeiture*, and, out of the mass of these subsisting methods of disposition, *selected and specifically enumerated only three of such dispositions* as falling within the purpose and intent of Congress.

A critical examination of the act, both generally and in detail, shows a clear intent not to embrace within the provisions of section two any claims not therein specifically enumerated.

The title of the statute is "An act for the *relief* of *settlers* on public lands." There is certainly nothing in this title to indicate in the mind of Congress an intent to provide for a forfeiture of any claims whatsoever. On the contrary, the language indicates an intent to *relieve* certain classes of claimants, settlers, from defective or invalid claims.

Section one of the act relates generally to entries made under three of the many acts above cited, to wit, pre-emption, homestead, and timber-culture entries (Nos. 4, 8 and 16 of our list, *supra*). As to such claims, and none other, it provides that upon relinquishment of any of the same at the particular local office by the claimants, the land should thereupon be at once subject to entry. This was an exceedingly liberal enactment in favor of the policy of encouraging disposition of the public domain. Theretofore entry could only be made upon relinquishment, filed after tedious delays in the General Land Office. Thereafter they could be instantly made. This was the first provision for the "relief" of settlers; a provision under which a claimant

who had settled upon land covered by an entry of the kind described could expeditiously perfect his claim.

Section three of the act is even more liberal in the direction of the contemplated relief. Theretofore the right of homestead claimants under the act of 1862 (No. 8, *supra*) dated only from the technical entry, and five years' residence thereafter was required before the title could be perfected. This section enlarged that right by making the title under an entry relate back to the date of an antecedent settlement with corresponding reduction of the residence required. This section, in fact, is the only legislation under which a homestead claim can date from time of actual settlement. This was the second step for the "relief" of "settlers," as announced in the title.

Between these two last above-mentioned sections is the provision of law now here in question. It is a total departure from the general intent of the law-makers, as expressed in the title and as illustrated by the other provisions of the act. Instead of being a "relief" to any "settlers" upon the public domain, it is an actual cloud upon all entries made under three of the general laws above cited by providing a means by which any entry under either of said acts can be attacked by a stranger, with possible forfeiture of the said entry in favor of the informer. It is a statute of forfeiture, pure and simple, by which a vested title to land may be divested and placed in the ownership of a common informer.

We insist with absolute confidence that a provision of this character, especially when found in a statute dedicated by its title to relief instead of oppression of claims, and in immediate contact with other provisions of an exceedingly liberal character, must be, in the literal sense of the rule, strictly construed; that it must be taken and understood in the ordinary and usual acceptation of the words and phrases

employed, and that it cannot be extended to any claim or classes of claims not specifically enumerated and described.

In United States *v.* Reese (92 U. S. 214, 219), the Supreme Court, speaking by Chief Justice Waite, thus defines the rule:

"This is a penal statute, and must be construed strictly; not so strictly, indeed, as to defeat the clear intention of Congress, but the words employed must be understood in the sense they were obviously used. (United States *v.* Wiltberger, 5. Wheat. 85.) If, taking the whole statute together, it is apparent that it was not the intention of Congress thus to limit the operation of the act, we cannot give it that effect."

In Tiffany *v.* National Bank of Missouri (18 Wall. 409, 410), the court, speaking by Mr. Justice Strong, in a case identical in principle with the present, said:

"In an action like the present, brought to recover that which is substantially a statutory penalty, the statute must receive a strict, that is, a literal construction. The defendant is not to be subjected to a penalty unless the words of the statute plainly impose it."

The language of this section is perfectly plain and unambiguous. Every word contained therein is either a word of common and ordinary acceptation or of a technical meaning equally well understood in land jurisprudence. In fact, the word "entry" is perhaps the only word in the entire section having any technical meaning. That word in its generic sense, as defined by the Supreme Court, is "an act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim, etc." (Chotard *v.* Pope, 12 Wheat. 586–588.) In its more particular use in the Land Department, however, it is limited to appropriations of public lands where money

is paid for the same, or where title is conditional upon the performance of certain acts, by way of consideration, as, for example, settlement, residence, improvement, and the like.

In this use it is placed in direct juxtaposition to "location," the method of acquiring title by the use of the various scrips we have mentioned (Nos. 3, 5, 7, 9, 10, 13), and also to "selection," the method of identifying the title covered by the grants to the States (No. 19), and of vindicating a segregation of land in satisfaction of a consideration paid, as in the case at bar (No. 6). And as limited by the remaining words of the section defining *what* entries were within the legislative intent, the words embrace only such entries as have been made *under the pre-emption, homestead, and timber-culture laws.*

The point here of particular importance is that in creating this remedy of statutory forfeiture, Congress, instead of embracing *all* of the dispositions of which public lands were susceptible, without embracing "locations" or "selections" at all, without even including *all* entries, picked out and selected entries under *three general laws only*, and included them by certain and specific description. This we insist was absolute *exclusion* of all entries not enumerated, and of all "locations" or "selections" whatsoever. *Expressio unius est exclusio alterius.*

Even the "entries" which may be contested under the statute in question are limited. It is not every entry which may be thus attacked. The privilege is strictly and plainly limited to entries under the pre-emption, homestead, and timber-culture laws. It must go without saying that a selection of land made under a treaty in satisfaction of a consideration paid to the Government is not an entry under either one of these three laws.

Another consideration in this immediate connection is

highly important. The statute is only made by Congress to apply to entries under acts where the completion of title depends upon compliance with conditions subsequent to the entry. The laws specified are the pre-emption, homestead, and timber-culture acts. Under each of these laws various requirements are prescribed, which must be met by the claimant prior to final consummation of his title. The obvious intent of Congress in the act of 1880 was to provide for a forfeiture of claims in cases, and such cases only, where these subsequent conditions had not been complied with. The contest privilege is expressly confined to that class and character of claims. It is not, by any possible stretch of construction, extended to cases where, at the date of the entry, all requirements of law had been fulfilled, and nothing more remained to be done save the issue of a patent.

There certainly was no intent on the part of Congress to allow a contest against an appropriation of public land, like that made by Warren in the case at bar, where no condition subsequent to selection of any kind or character was required, and where the selection itself was founded upon a valuable consideration already transferred to the Government.

We are by no means unmindful of the fact that the Department of the Interior has, in recent cases, extended the provisions of this act of 1880 to other classes of entries than those described in the statute. We are aware of the fact that the Department has even gone further, and has held that this act applies to "locations" made with the various scrip, to "selections" made under the various grants to the States, and perhaps to other cases equally beyond the plain language of the act. In respect to such decisions of the Department, we have simply to say that they are manifestly in direct violation of the statute of

Congress which we have above cited; and, as mere conclusions of law, in the construction of the acts, are not binding on this court.

Should it be claimed (as has sometimes been done in other cases) that the words "pre-emption * * * entry," as used in this act, embrace all kinds of appropriation allowed by the laws of the United States, we reply:

(1) Whatever may be the *general* meaning of the word "pre-emption," the words "pre-emption entry" have a well defined and accepted technical meaning in land jurisprudence, to wit, an entry made under the general pre-emption act of September 4, 1841 (10 Stat. 455), and subsequent acts amendatory thereof. No one having the slightest knowledge of land jurisprudence will seriously question this proposition. This being so, Congress, in the act of 1880, must be held to have used the words in question in this technical sense. This upon elementary rules of construction too well known to require citations.

(2) The use of the words "homestead" and "timber culture," immediately following the word "pre-emption" and before the common word "entry," conclusively shows that the three first-mentioned words refer to the respective acts relating to these three classes of appropriation; in other language, to the technical pre-emption, homestead, or timber-culture entry, as the case may be. Otherwise there would have been no necessity for the use of the words "homestead" and "timber culture," for all would have been included in "pre-emption."

(3) The unwarranted extension of the remedy by the Department to other than the enumerated cases has never been based upon any idea that such unenumerated cases were included in the word "pre-emption." The Department, on the contrary, has curiously found some *general intendment* of the act to justify its extensions.

This very question has been directly decided by the Supreme Court of California and by the Circuit Court of Appeals for the Eighth Circuit, in favor of our contention.

Gray *v.* Dixon, 83 Cal. 33.

Hartmann *v.* Warren, 76 Fed. R. 157, 160 to 162.

In the case of Gray *v.* Dixon (83 Cal. 33), the very question here presented directly arose and was specifically decided. The exact question was whether a contestant who had contested a *desert-land entry* and procured the cancellation thereof was entitled to a preference right of entry under section 2 of the act of 1880. In deciding this question, the Supreme Court of California, at page 38, said:

"That act, in terms, does not mention entries under the desert-land law, such as the respondent is found to have initiated his contest against, and obtained the cancellation of by the Land Department. Although we cannot perceive any reason for the omission of desert-land entries in the above enumeration, the fact of its omission makes the rule, *Expressio unius exclusio alterius est*, applicable; and we must hold that respondent acquired no 'preference right' to enter the land by successfully contesting the right of Ward to enter it under the desert-land act."

The case of Hartmann *v.* Warren (76 Fed. R. 157, *supra*) involved this very location and the identical question now under consideration. After being defeated in the Department in his contest against the Warren location, and after patent had issued to Warren, as hereinbefore recited, Hartmann filed bill in equity to charge Warren and his grantees as trustees. Demurrer to the bill was sustained by the Circuit Court and also upon appeal by the Circuit Court of Appeals, and the case was prosecuted no further. One of the questions directly involved and decided was whether the Warren location was covered by the provisions of the second

section of the act of 1880. Upon this point the Circuit Court of Appeals, by Sandborn, C. J. (pp. 160, 161, 162), said:

"But counsel for the appellant insists that if Hartman acquired no right to the land by his offer to locate it with his Porterfield warrants on March 11, 1889, he did acquire under section 2 of the act of May 14, 1880 (21 Stat. 141, c. 89, § 2), the right to be preferred in the acquisition of the title to it by virtue of his attack upon the location and entry of Warren, which he instituted on March 19, 1889. Section 2 of the act of May 14, 1880. * * *

"It is unnecessary to consider, and we do not decide in this case, whether this term in the act of 1880 is broad enough in its significance to cover an entry under acts of Congress, other than the general pre-emption act of September 4, 1841, and its amendments, which gave a preferred right to him who occupies or improves the land he seeks to enter. Conceding that its significance is broad enough for that purpose, that is, in our opinion, the extreme limit of its meaning. A long list of entries remain, to make which no preferred right can be obtained by occupation, cultivation, or improvement. There are private entries for cash; locations with bounty land warrants; locations with New Madrid certificates under the act of February 17, 1815 (3 Stat. 211), and amendments; locations with Chippewa Mixed-Blood scrip under the treaty of September 30, 1854 (10 Stat. 1109), one of which is in question in this case; locations under Porterfield warrants under the act of April 11, 1860 (12 Stat. 836), one of which appellant sought to make; locations with agricultural college scrip under the act of July 2, 1862 (12 Stat. 503), and its amendments; locations with private land scrip under the act of June 22, 1860 (12 Stat. 85), and its amendments; locations with Valentine scrip under the act of April 5, 1872 (17 Stat. 649); entries under the grants of swamp lands, of school lands, and of lands for internal improvements to the various States of the Union (Rev. St. §§ 2479–2490, 1946, 2378, 2379), and doubtless many others of like character. Here are 11 classes of entries, which have been specifically mentioned, that are marked by

the want of the characteristic that a preferred right to make them can be acquired by settlement or improvement of the land to be entered, and the entry of Warren belongs to one of these classes. The distinguishing mark of a pre-emption entry is that very characteristic. The only logical conclusion is that Congress used that term to distinguish the class of entries which have this distinctive feature from those that have it not, and that it intended to subject 3 of the 14 classes which we have enumerated—that is to say, homestead entries, pre-emption entries, and timber-culture entries—to the burdens and dangers imposed by the second section of the act of 1880, and to exclude all others from the effect of its provisions.

"It is suggested that the officers of the Land Department have reached the opposite conclusion, and have held, in effect, that by the use of this term the act of 1880 subjects every entry of the public land to the provisions of that section. After a careful perusal of the opinions of the officers of the land department, which have been cited to us, we are not satisfied that they have ever gone to that length, and, if they had, we should be compelled to decline to follow. The opinions of the officers of that department are entitled to careful consideration and may well be permitted to lead the way to the proper construction of an ambiguous statute; but where the words of an act of Congress are plain, and their meaning is clear, they must prevail. Webster *v.* Luther, 16 Sup. Ct., 963, 967; U. S. *v.* Tanner, 147 U. S. 661, 663, 13 Sup. Ct. 436; Merritt *v.* Cameron, 137 U. S. 542, 11 Sup. Ct. 174; U. S. *v.* Graham, 110 U. S. 219, 3 Sup. Ct. 582; Swift Co. *v.* U. S., 105 U. S. 691. After a deliberate consideration of all the terms of the act of 1880, in the light of the legislation for the disposition of the public lands in force when it was enacted, all doubt of its true construction has been dispelled, and we have become satisfied that the preferred right to enter land granted to the contestant by the second section of that act was granted to the successful contestant of a pre-emption, homestead, or timber-culture entry only, that the entry of Warren was neither of these, and that Hartman acquired no right to be preferred in the acquisition of this land by his contest of

the claim of Warren. In view of this conclusion, it is immaterial that there was a regulation of the Land Department under which he would have been entitled to such a preferred right, if he had succeeded. The Land Department may undoubtedly make reasonable regulations for the conduct of the business intrusted to it and the discharge of the duties imposed upon it, provided, always, that they are not inconsistent with the legislation enacted and the policies adopted by Congress. But the act of 1880, which grants a preferred right of entry to contestants of three specific classes of entries out of more than a dozen, is an implied prohibition of any such preference to the contestants of entries which belong to the classes excluded from that enactment. Any regulation of the Land Department which allows such a preference is inconsistent with this prohibition, and must be disregarded."

* * * * * * *

Counsel for plaintiff in error, upon pages 16 and 17 of their brief, cite twenty court and departmental cases as authority for the proposition that the dismissal of Hyde's contest was without notice and *ex-parte* and therefore not binding upon the court. We have critically examined all the cases so cited. Their discussion in detail would be beyond any pardonable extension of the argument. It is sufficient to say that such examination shows that, in the entire line of cases cited, there is not a single decision, either court or departmental, which goes further than to declare that the Land Department cannot arbitrarily, and in its discretion only, dispose of questions affecting the public lands *without notice to claimants interested therein.*

All of the light to be derived from these decisions reflecting in any way upon the question at bar is found summarized in two of the decisions of this court cited by our opponents.

Orchard *v.* Alexander, 157 U. S. 372–383.

Parsons *v.* Venzke, 164 U. S. 89.

In Orchard *v.* Alexander, *supra*, the court, after an exhaustive review of all the cases, sustained the power and authority of the Land Department, including the Secretary, upon appeal, to investigate, ascertain the facts, and, upon satisfactory showing of illegality, to cancel, before patent, a consummated entry of the public lands. Thereupon, proceeding to define the limitations to this doctrine, the court, by Mr. Justice Brewer (p. 383), said (the italics being our own):

"Of course, this power of reviewing and setting aside the action of the local land officers is, as was decided in Cornelius *v.* Kessel, 128 U. S. 456, not arbitrary and unlimited. It does not prevent judicial inquiry. Johnson *v.* Towsley, 13 Wall. 72. The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed. His interest is subject to State taxation. Carroll *v.* Safford, 3 How. 441; Witherspoon *v.* Duncan, 4 Wall. 210. The Government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights *without due process of law. Due process in such case implies notice and a hearing.* But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department."

In Parsons *v.* Venzke, *supra*, the court had occasion to again consider the question, and speaking by Mr. Justice Brewer (p. 91), said:

"Subsequently to the issuing of the writ of error in this case, this precise question was presented to this court, Orchard *v.* Alexander, 157 U. S. 372, and the jurisdiction of the Land Department was affirmed; a jurisdiction not arbitrary or unlimited, nor to be exercised without notice to the parties interested, nor one beyond judicial review under the same conditions as other orders and rulings of the Land Department.

"In this case the entryman was brought in by due publication of notice, and the real party in interest appeared. The contest was carried through the Land Department, from the lowest to the highest officer, and there is nothing in the record which brings the case within the rules so often laid down for a judicial reversal of the decisions of that department."

It is difficult to imagine how there ever could have been a controversy upon such a question. Undoubtedly, a right initiated under the public land laws, whether consummated or not, can no more be destroyed, without due process of law, than any other right of property. The question simply is: What constitutes due process of law in any given case? And if there ever could have been any doubt upon that subject, as to proceedings in the Land Department, it is certainly settled in the above cases by the authority of this court. Claim of title to public lands is legally denied, by due process of law, when, in a proper case, notice has been given to the claimant and an opportunity has been accorded him to be heard in defense.

In view of the foregoing considerations, what becomes of the claim advanced by the plaintiff in error that the action of the Commissioner in vacating the order for a hearing was *ex-parte* and that thereby Hyde was deprived of some right in the premises? How can a proceeding be denominated *ex-parte* which was simply a ministerial act by a subordinate court executing the judgment of a superior court, in a proceeding to which the person now complaining was a party and in which he actually appeared in the superior court, asserting every right and a great deal more than he would have been entitled to present in the lower jurisdiction? And how did the fact that the party complaining was not given opportunity to be heard by the lower court operate as a denial of any right when, as matter

of fact, he was asserting all his rights before the superior tribunal? There can, of course, be but one answer to these questions, and that answer involves the necessary conclusion that there was no error whatever in the order of the Commissioner vacating the order for a hearing.

Upon the whole general question which we have here particularly discussed, we therefore respectfully submit that the decisions of the Land Department now before this court are adjudications of fact conclusive upon the court; that in any event they are adjudications of mixed law and fact, and therefore conclusive; that the pre-emption claim of Hyde was directly in issue in the proceeding before the Secretary which resulted in the cancellation of the Sioux Half-Breed scrip location; that the testimony showing the illegality of Hyde's pre-emption claim was properly before the Secretary of the Interior and that there was no error in the action of the Commissioner in his letter vacating the order for a hearing upon Hyde's application to contest the Warren location.

It follows, as a general conclusion, that the decisions of the Department of the Interior now before the court are conclusive, whether such decisions were right or wrong, and that, for these reasons alone, the decree of the court below must be affirmed.

2.

Upon the merits, departmental decision correct.

If the departmental decisions are not final and conclusive as findings of fact, and the court may now look into the merits of the case upon which the Department passed, it then appears that the testimony affirmatively showed the existence of a prohibited contract; that the decisions were

therefore correct, and that for this reason the judgment below must be affirmed.

In this connection, it should be borne in mind that Hyde is affirmatively seeking to establish an equitable defense, occupying precisely the position of a complainant in equity seeking to restrain proceedings at law, and that the burden is upon him to establish the fact that there was error in the finding of the Department.

Occupying this position, in order to maintain his equitable defence, it is absolutely essential that he should affirmatively establish the whole of his case. In other words, if such positive affirmative case has not been established, the defendants in error are entitled to an affirmance of the judgment below.

Lee *v.* Johnson, 116 U. S. 48–50.
Bohall *v.* Dilla, 114 U. S. 47-51.
Sparks *v.* Pierce, 115 U. S. 408, 413.

And the court will not review the action of the Department in a mere determination of the weight of evidence in the case or deductions from the proofs presented.

Shepley *v.* Cowan, 91 U. S. 340.
Baldwin *v.* Stark, 107 U. S. 465.
Sanford *v.* Sanford, 139 U. S. 647.
Lee *v.* Johnson, 116 U. S. 51.
Quinby *v.* Conlan, 104 U. S. 425, 426.

If there was testimony before the Secretary of the Interior tending to prove the existence of the contract in question, and that testimony so tending was not refuted or denied by other testimony, the decision of the Department will not be disturbed by this court.

Diller *v.* Hawley, 81 Fed. Rep., 651.

The last above-cited case, as we have already noticed, was

one wherein there was no direct evidence of the existence of a prohibited contract, but the Secretary had inferred the fact from circumstances surrounding the transaction; in other words, by a deduction from evidence, had found the fact that the claimant was not acting in good faith, but had made a contract under which his title would enure to another. Addressing itself to this situation and to the question whether such an action on the part of the Department was conclusive as a finding of fact, the court (p. 658) said:

"We are of opinion that the evidence upon which the Secretary of the Interior acted was sufficient to justify the inference that there was some prior understanding, although not directly shown, between Hackley, the entryman, and Lohr, acting with and for Bailey, that his acts should inure to their benefit, and that he applied to purchase the land on a speculation, and not 'in good faith to appropriate it to his own exclusive use and benefit;' and that such acts are as much in violation of the statute as if the entryman had directly made a contract in writing with a person, by which the title which he might acquire from the Government should enure to such person; and that the facts elicited upon the trial of this case in the circuit court are not of such a character as to authorize the court to enter a decree in favor of the appellees herein."

Considered in the light of these rules of the law, how stands upon its merits the decision of the Secretary adverse to Hyde? The testimony before the Secretary, as set out in the cross-petition, is published at pages 18 and 19 of the Transcript. That of the plaintiff in error, Hyde, as thus set forth, is as follows:

"Q. Did you have any contract with Mr. White in writing or otherwise by which he was to receive any compensation or interest in the land?

"A. Yes; there was a contract.

"Q. Where is it?
"A. I don't know.
"Q. When and where did you see it last?
"A. I have not seen it since it was drawn by Mr. White.
"Q. What did it contain?
"A. It contained when I proved up on the land I was to secure him on a one-half interest.
"Q. Who witnessed the contract?
"A. Powers, McDonald and myself and Mr. White were together; that is all I recollect. I can't say whether Powers witnessed it or not. The last I knew of the contract Mr. White had it. Mr. Powers was not included in the contract with McDonald and myself and White."

This testimony, beyond any possible question, shows that there was a contract in existence between Hyde and White, by which White was to receive some "compensation" or "interest" in the land; that, when last seen, this contract was in White's possession; that it was to the effect that when Hyde proved up, he was to secure White "on a one-half interest;" that this contract also included McDonald as a party. This testimony of Hyde, standing alone, might possibly have been susceptible of two constructions, one for and one against the existence of a prohibited contract. Except for the use of the expression "secure him on a one-half interest," the contract would certainly have been one prohibited by law. The peculiar expression above quoted might or might not indicate that the contract was to convey a portion of the premises by way of mortgage. That, however, was a question, under the authorities cited, for the Secretary of the Interior to decide, into which the court will not inquire.

But, whatever construction might by varying minds be placed upon this testimony of Hyde, it is entirely clear, by reference to the testimony of McDonald, that the contract was an agreement for an absolute sale and not a mortgage.

McDonald's testimony, as quoted in the cross-petition, is as follows:

"Mr. White has furnished me the supplies to keep me on the claim. I am making the improvements for myself. I don't know of any one being interested in the claim except myself. Judge White has no interest in it. There is an understanding that he is to have an interest in it if we succeed in this trial. He is to have a half interest. I know R. D. Mallett; he has no interest in the claim, he is not going to have any.

"The arrangement with Hyde is the same as mine. White is to have half if we succeed in this. James H. Powers is also to have an interest in it if we succeed. I don't know how much he is to get. I agreed to give him an interest if we succeeded in getting the land. Mr. Hyde went after Powers to come and testify in the case. I never had any talk with Mallett about the claim. Mr. White is paying the expenses of the claim, with the understanding that he is to have a half of it if we secure it."

Then follows a redirect and cross-examination, which further changes in no material respect the statement of McDonald previously made. In the redirect examination, in answer to a worse than leading question obviously intended to suggest to him the use of the word, he says the contract was "a security"; but immediately, upon further cross-examination, he reiterates the statement that White was to have an interest in the land when he, the witness, secured it "to pay him for his time and services," and furthermore admitted that the transaction could not be carried out without a conveyance of a portion of the premises. This redirect and further cross-examination will not be accepted by the court, as it was not by the Department, as showing anything more than an abortive attempt to evade the damaging effect of the first admissions of the witness.

The entire testimony of McDonald, therefore, was to the

effect that White was furnishing supplies to keep him on the land; that there was an understanding that White was "to have an interest" in the land if the witness succeeded in procuring it; that this interest was to be "a half interest"; that White was paying the expenses, with the understanding that he was "to have a half" of the land if McDonald secured it; and that Hyde's arrangement with White was the same as that of the witness.

Taking the testimony of these two witnesses together, there can be no reasonable doubt as to the character of the agreement which was made. The paper was the same; McDonald's testimony clearly made it an absolute contract for the conveyance of an undivided interest, and Hyde's testimony is consistent with that theory of the case.

The testimony of White, which could, of course, have explained the whole situation favorably to his clients, if that had been possible, instead of doing that, furnishes, by what is obviously suppressed rather than by what is said, conclusive evidence of the actual existence of the contract. White was the attorney of both of these claimants. He well knew the effect of such a contract. According to his own testimony, that contract had disappeared from his possession. He was in a peculiar situation. If he denied that the contract was one for conveyance of one-half of the fee, he was liable to be confronted by the contract itself. And if he said nothing on the subject, the inference as to the existence of a prohibited contract would be irresistible. Bearing this situation in mind, we invite the attention of the court to his testimony in full (Tr., p. 18):

"I am one of the attorneys for the contestant; I have made careful search through my safe and among all my papers for the contract of security given me by the *contestants* in these cases to secure me for advances and legal services, and I am unable to find it. I supposed until about

two or three days before the day set for hearing that it was in the files of the case in my office, but I have looked through that and could not find it and have made a careful search through my safe and among all my papers where I thought it could be, and have continued that search at various times up to this morning, when I made a last final search through my safe and have been unable to find it and have no idea where it is."

If anything further than the testimony of Hyde and McDonald were necessary to show beyond question the existence of the prohibited contract, it is found in this evasion by their counsel. His testimony was an obvious attempt to give the color of a security to the instrument without putting himself in the position of testifying to any such fact, with the possibility of being confronted with the contract itself. With the damaging testimony of both Hyde and McDonald before him, he goes no further in his own testimony than to refer to the paper incidentally, and almost parenthetically, as a "contract of security." A skilled lawyer never adopted that expression under such circumstances if, as matter of fact, the contract was not an absolute one for an undivided half of the fee.

It is claimed, however, that the testimony of Hyde was misread and misunderstood by Secretary Vilas, and that this misreading and misunderstanding of certain of the actual words used by Hyde is such an error as would remove from the decision the effect of conclusiveness. The words in question as used by Hyde, according to the cross-petition, were "*on* a one-half interest" instead of "*a* one-half interest." The words as recited in the decision simply omit the word "on" in this particular answer. It is claimed that the effect of this was to recite in the decision testimony by Hyde which indicated an absolute contract to convey one-half of the fee, whereas the actual language indicated that

the conveyance was to be by way of security or mortgage. This recitation, it is claimed, was such an error as will permit the court to treat the finding of the Secretary as inconclusive. To this proposition we answer:

First. There is nothing whatever in the case to show how this variance between the Secretary's decision as printed, and the testimony of Hyde as found in the record, occurred. It may have been a mere clerical mistake of the clerk, or stenographer who wrote out the decision. The testimony, exactly as taken and recorded, may have been correctly read and as correctly read have been given the full force which our opponents claim for it. It does not necessarily follow because the word "on" was omitted in the print of the Secretary's decision, that therefore the testimony was so read by the Secretary. One inference, from the record, is just as plausible as the other. And as Secretary Vilas left the office within thirty days after the rendition of his decision and therefore had no connection whatever with the disposition of the case afterwards, it follows that in the subsequent decision on review the real fact in this connection is not stated. Had Secretary Vilas remained in office and disposed of the motions for review, there would undoubtedly have been now no question upon this subject. In any event, this court will not assume that a mere misprint of this kind indicated, in fact, any misapprehension or misreading of the testimony as given.

Second. The decision of Secretary Vilas did not rest alone upon this testimony of Hyde. There was also the testimony of McDonald and White. In fact, it was the latter testimony which was mainly convincing upon the question. Hyde's testimony might have been omitted from the case altogether and there still would have been abundant evidence to have supported the finding. And even if it be conceded that the testimony of Hyde was actually misread

and that, as given, it bears the construction for which our opponents contend, still that would not have changed the preponderance of evidence in favor of the existence of an illegal contract; for McDonald gave the terms of that contract with precision, said that the contract on the part of Hyde was exactly the same, and White practically corroborates him by his evasive testimony.

Third. The exact contention here made was raised before and decided by Secretary Noble upon the motion for review. (App. No 2, 12 L. D., 157–160.) One of the points raised by Hyde in this motion for review, as stated by the Secretary, was "that the testimony was misquoted in said decision." This error was fully argued before Secretary Noble and is by him, in his decision, discussed at length and decided adversely to the contention of Hyde. The language of the Secretary upon this point was as follows:

"This change does not, however, destroy the effect of the testimony taken as a whole or necessarily demand a different conclusion. There is testimony to sustain the finding on this particular phase of this case and it is not shown that such finding was against the palpable preponderance of the evidence. In such cases a review will not be allowed."

It is thus seen that upon this question, as upon all others, Hyde has had his day in court.

Secretary Noble's decision, as above made, is certainly not a conclusion of law. It was simply, upon review of his predecessor's decision, a deduction from the corrected evidence, and was the result of determining the weight of testimony; precisely such a case as this court has repeatedly declared cannot be reviewed by the judicial branch of the Government.

The ultimate rejection, however, of Hyde's pre-emption

claim did not rest alone upon the testimony of himself, McDonald, and White in the original case. As we have already pointed out, after Secretary Noble's decision, another case arose between conflicting claimants, each alleging priority of application, after the cancellation of the Sioux Half-Breed location. To Hyde, under Secretary Noble's decision, was reserved the right to become a party to the new case. He actually became a party thereto and participated in the hearing and trial. At that trial "voluminous testimony" was taken upon this point and the Commissioner in his decision expressly finds that this additional testimony "clearly and conclusively" established the fact of the existence of the prohibited contract even if that fact did not satisfactorily appear in the first decision. (Commissioners decision, Appendix No. 3.)

When, therefore, Secretary Smith came to dispose of the second proceeding by his decision of December 21, 1894 (Appendix No. 4, 19 L. D. 547), he had before him additional and further testimony establishing clearly the existence of the contract. That he did not mention this fact in the decision, or the fact that the Commissioner had so determined upon such additional evidence, simply shows that in his judgment the question was *res adjudicata*, standing upon the original testimony alone, and that there was, therefore, no necessity for reviewing the mass of additional evidence which had been taken.

The position of counsel upon this point, in view of the situation as demonstrated by this second case, can hardly be explained, unless our friends assume that the omission, in the cross-petition, to make any mention whatever of this second case to which Hyde was a party cannot be supplied by the judicial notice which this court will take of the official records of the Interior Department upon this point.

In conclusion upon this point, we submit that the weight of the testimony precisely as given showed the existence of an illegal contract; that the misquotation of Hyde's testimony in the decision of Secretary Vilas was not such a mistake, even if it had followed a misreading of the testimony, as would have changed the result; that Secretary Noble, reviewing the whole question, again decided, upon the corrected testimony, that such a contract existed, and that the motion for review contained no ground for its its allowance, and, finally, that when the case was ultimately decided by Secretary Smith, there was abundant additional testimony showing conclusively the existence of the contract. We further submit that all of these questions involved decisions of the Land Department upon the weight of evidence which will not, under any circumstances, be reviewed by this court.

The contract thus shown to have been made between the parties was in direct violation of section 2262, Revised Statutes of the United States; the claim of Hyde was illegal and fraudulent, and the same was properly rejected and cancelled by the Land Department.

Myers *v.* Croft, 13 Wall. 291.
Warren *v.* Van Brunt, 19 Wall. 646, 654, 655.
Quinby *v.* Conlan, 104 U. S. 420, 422.
Anderson *v.* Carkins, 135 U. S. 483, 486 to 489.
U. S. *v.* Steenerson, 50 Fed. 504, 510.
Diller *v.* Hawley, 81 Fed. 651, 658.
Bass *v.* Buker, 6 Mont. 442, 444, 446, 447.
Marshall *v.* Cowles, (Ark.) 3 S. W. R. 188, 189.
Snow *v.* Kimmer, 52 Cal. 642.
Brewster *v.* Madden, 15 Kan. 249 to 251.
Ainsworth *v.* Miller, 20 Kan. 220, 222, 224.
Mellison *v.* Allen, 30 Kan. 382, 383, 384, 385.

St. Peter Company *v.* Bunker, 5 Minn. 192 (Gil. 153).
Bruggerman *v.* Hoerr, 7 Minn. 337 (Gil. 264).
McCue *v.* Smith, 9 Minn. 252 (Gil. 237).
Woodbury *v.* Dorman, 15 Minn. 338 (Gil. 272).

In Warren *v.* Van Brunt (*supra*) the court, by Chief Justice Waite, thus stated the law on this subject (page 654):

"But such a contract cannot be enforced to any extent. The pre-emption laws provided, at the time of this entry and purchase, that before any person should be allowed to enter lands upon a claim for pre-emption he must make oath that he had not directly or indirectly made any agreement or contract in any way or manner with any person, by which the title he might acquire by his purchase should enure in whole or in part to the benefit of any person except himself. Forfeiture of title to the land purchased and of the money paid for it, was made the penalty of false swearing in this particular. An entry could not have been made, therefore, by Van Brunt in trust for Warren; and if it could not have been made, a court of equity will not decree that it was. All contracts in violation of this important provision of the act are void and are never enforced. It has been so decided many times by the Supreme Court of Minnesota. We are satisfied with these decisions."

And to exactly the same effect are the decisions of the Land Department.

Lyon *v.* Iver, 6 L. D. 746.
Smith *v.* Custer, 8 L. D. 269.
Molinari *v.* Scholari, 15 L. D. 201.
Tagg *v.* Jensen, 16 L. D. 113.

But it is claimed by counsel that the testimony in the case, taken as a whole, shows that the contract was one for security, and that it was not, therefore, such a contract as is prohibited by section 2262 of the Revised Statutes of the United States. To this proposition we answer:

First. That the testimony does not, by any fair deduction, show that the contract made was a mere security or mortgage. That was the innuendo of the questions as put by counsel for Hyde, and in his own testimony. But, outside of the peculiar expression used by Hyde himself, there is no word in the whole of it which can fairly be said to characterize the contract as a security or mortgage, and the whole testimony taken together shows by a fair preponderance of the evidence, even considered as an original question, that the paper in question was a contract for absolute sale.

Second. The character of the instrument, whether a contract for a conveyance for a part of the fee or a contract operating merely as a security, was a conclusion to be drawn from the evidence—a deduction of an ultimate fact from probative facts established. It was, therefore, upon principle, as well as the authorities already cited, a question which will not be re-examined or reviewed in this court.

Third. That if such contract was intended to be and was in form a security or mortgage, it was still prohibited by section 2262 of the Revised Statutes and rendered the claim of Hyde illegal and invalid.

In support of their contention in this regard, counsel, upon page 27 of their brief, cite six departmental decisions and decisions of the Supreme Court in each of five States—Montana, California, Minnesota, Colorado, and Wisconsin.

Upon this question there is a conflict of authority and, so far as we have been able to discover, it has never been raised or decided in this court.

From the earliest date to the year 1882, it had been the uniform ruling of the Land Department that a mortgage of a pre-emption claim prior to final proof and payment was a contract prohibited by this section of the Revised Statutes and made illegal the pre-emption claim. April

24, 1882, however, Secretary Teller, in the case of Larson *v.* Weisbecker (1 L. D., p. 409), departed from the former construction of the Department and laid down the rule that a mortgage by a pre-emptor, made for the purpose of obtaining money with which to pay the Government price for the land, was not an alienation within the meaning of the law; and this doctrine seems to have been since adhered to by succeeding Secretaries.

The same doctrine has also been announced by the Supreme Courts of Montana, California, Colorado, and Minnesota in the cases cited in our opponents' brief. The case of Spies *v.* Newberg (71 Wis., 279), also cited in that brief, will be found, upon examination, not to cover the proposition.

The authority, however, in Montana, California, Colorado, and Minnesota has not always been as stated above. In Bass *v.* Buker (6 Mont., 442, 444, 447) the Supreme Court of the then Territory, in an elaborate opinion delivered by Back, Justice, held that a mortgage was clearly within the prohibition of the statute. This case was subsequently overruled by that of Norris *v.* Heald (29 Pac. R., 1121, 1124), the case found upon brief of counsel.

In California, in the case of Bull *v.* Shaw (48 Cal., 455, 459), the Supreme Court of that State originally held in accordance with our contention. This case was, however, as in the instance of Montana, overruled by Stewart *v.* Powers (33 Pac. R., 458, 469).

In Minnesota, two of the earlier adjudications of the Supreme Court, in well-matured opinions, held emphatically that a mortgage was in violation of the statute. (McCue *v.* Smith, 9 Minn., 252; Gil. 237; Woodbury *v.* Dorman, 15 Minn., 338; Gil. 272.) At a later date, however, the court overruled these prior decisions and held to the contrary. (Jones *v.* Tainter, 15 Minn., 423, 425.)

It is thus seen that although the latest decisions in three of the States enumerated are now to the effect that a mortgage is not prohibited, yet that in all three of such States the opposite rule very recently prevailed.

Upon the contrary, the Supreme Court of the State of Kansas, speaking by a learned member of this court, then upon the Kansas bench, has, in two well-considered cases, declared that a mortgage is within the prohibition of the act.

Brewster *v.* Madden, 15 Ka., 249, 250 to 251.
Mellison *v.* Allen, 30 Ka., 382 to 385.

In Brewster *v.* Madden (*supra*), the Supreme Court of the State, speaking by Mr. Justice Brewer, said:

"Is a mortgage given by a pre-emptor, prior to the entry of the lands, void? and if so, are his heirs estopped from setting up its invalidity in an action to foreclose the mortgage? These are the only questions presented in this case. The mortgage was on the lands entered, and on four town lots. It was given long before the entry, and to secure simply the purchase-price of the four lots. Intermediate the mortgage and the entry, the mortgagor died, and the entry was made by the widow, in the name and for the benefit of the minor heirs. Sec. 13 of the act of Congress of September 4th, 1841 (U. S. Stat. at Large, p. 456), provides that before an entry shall be allowed, the claimant shall make oath that 'he has not directly or indirectly made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself;' and it also provides that 'any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers for a valuable consideration, shall be null and void.' The question is not free from difficulty. On the one hand it may be said that, as viewed in this State, a mortgage is neither a grant nor a conveyance, and there-

fore not within the letter of the statute; that a statute like this ought not to be extended by any construction beyond its plain letter, nor held to invalidate transactions not specifically and directly forbidden; that often a pre-emptor needs assistance to complete his payment, which assistance he can only obtain by giving the land itself as the security, and that to deny him the use of the land for this purpose is against the spirit of the law. Watterson *v.* Kirkwood, 8 Kas. 465. On the other hand, it may be urged that the terms 'grant' and 'conveyance' are broad enough to include a mortgage as much so as the term 'alienation' in the constitutional and statutory homestead sections, and that it is so used in this section is evident from the terms of the affidavit required; that a mortgage is certainly an 'agreement or contract,' by which the title 'would inure in part to the benefit' of the mortgagee, and that as the pre-emptor must swear that he has made no such agreement, so the agreement when made must be held null and void. McCue *v.* Smith, 9 Minn. 252; Warren *v.* Van Brunt, 19 Wall. 646. We are inclined to favor the latter construction, and to hold that Congress intended by this section, that when the title passed by the entry to the pre-emptor, it should pass perfect and unincumbered. This act was passed in 1841. Mortgages, always in form conveyances, were then regarded by the profession generally more as conveyances, and subject to the laws and conditions of conveyances, than at present, perhaps anywhere, and certainly in Kansas; and in the light of the general understanding then, must this section be considered. It seems more reasonable that by these terms, 'grant' and 'conveyance,' was intended all forms of conveyance, whether absolute, as a warranty deed, or upon condition, as a trust deed, or mortgage."

In Mellison *v.* Allen (*supra*), the Supreme Court of said State, by Mr. Justice Brewer, said (pp. 383 *et seq.*):

* * * * * * *

"Thus it will be perceived that the law contemplates a five years' continuous occupation by the homesteader, with no alienation of interest, except for the named purposes.

It is true these sections contain no express prohibition on alienation, and no declaration of forfeiture or penalty in case of alienation; and yet the homestead right cannot be perfected, in case of alienation, without perjury to the homesteader. The statute respecting pre emption, section 2262, is more stringent and express. For that requires the pre-emptor to make oath that he has not directly or indirectly made any agreement or contract in any way or manner with any person whatsoever, by which the title he is seeking to acquire should inure in whole or in part to any person except himself; and also provides that any person swearing falsely in such oath shall forfeit the money which he may have paid for such land, and all right and title to the same; and further, that any grant or conveyance which he may have made shall, with certain exceptions, be null and void. Under this last section we held, in *Brewster* v. *Madden* (15 Kans. 249), that a mortgage made by a pre-emptor is an alienation, and void."

* * * * * * *

"We think the latter reasoning correct, and that whether the contract be absolutely void, or not, it is so clearly against the will and policy of the government, and so necessarily resting upon perjury, that a court of equity will have nothing to do with it."

The question here under consideration does not, as hereinbefore stated, appear to have been directly considered or decided by this court, but indirectly the court has given its sanction to the doctrine of the Kansas cases. In Warren *v.* Van Brunt (19 Wall. 655), which came to this court from the Supreme Court of Minnesota, one of the questions which arose was whether a contract made between two pre-emption claimants who had settled upon the same forty-acre tract, then unsurveyed, establishing a partition line between their claims, could be enforced by one of such settlers as against the other holding the Government patent by charging the patentee as the trustee. Speaking to this question and

specifically citing the decisions of the Supreme Court of that State hereinbefore referred to holding a mortgage to be prohibited, this court, by Chief Justice Waite (p. 655), said:

"An entry could not have been made, therefore, by Van Brunt in trust for Warren; and if it could not have been made, a court of equity will not decree that it was. *All contracts in violation of this important provision of the act are void and are never enforced. It has been so decided many times by the Supreme Court of Minnesota. We are satisfied with these decisions.*"

We thus have, as sustaining the proposition that a mortgage is prohibited, the former decisions of the Supreme Courts of California, Montana, and Minnesota; the continuing decisions of the Supreme Court of Kansas, and the fair inference of the judgment of this court expressed in Warren *v.* Van Brunt. Against this stand the decisions of the Secretary of the Interior, departing from the former well-established rule and the later decisions of Colorado, Montana, and Minnesota. We submit that the weight of authority is consonant with the Kansas cases and the earlier cases of the other States.

With great respect for the judicial authorities above mentioned which are against us on this proposition, we nevertheless submit that the principle upon which the question must be solved is plain and that it has been overlooked in the decisions in question. The prohibition was intended to prevent speculation in these claims; to prevent the hiring of settlers to take possession of Government lands simply that the title might eventually pass to others than themselves. To accomplish this end, words are used as plain as the English language is susceptible of producing. The statute in the first place provides that before an entry can be allowed,

the claimant must make an oath "that he has not directly or indirectly made any agreement or contract, in any way or manner, with any person whatever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself;" and in the second place, that if any person shall take such oath falsely, he shall forfeit the money which he has paid for the land and that "any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers for a valuable consideration, shall be null and void, except as provided in section twenty-two hundred and twenty-eight." Any contract which is a plain and palpable violation of this law must be prohibited by it and judicial construction should not, we submit, be allowed to defeat the intent of Congress. What easier and more convenient subterfuge could be adopted by speculators to avoid the act than an instrument in the form of a mortgage, thus evading the prohibition of the law without incurring its penalties; and yet that is precisely what may be done and undoubtedly will be done should the doctrine ever be finally and authoritatively announced that a mortgage is not within the provisions of the act. We confidently submit that no construction should be adopted which would work that result against what seems to be the plain language of the act, and we are entirely content to rest our contention in this regard upon the opinion of Judge Bach in the Montana case and upon those of Mr. Justice Brewer in the two Kansas cases above cited.

It is further in this connection to be observed that all of the cases hereinbefore referred to in which the mortgages have been held to be not within the prohibition of the act proceeded upon one special condition or fact common to all the cases, viz., that the mortgage in the particular case was

made either for the purpose of obtaining money with which to pay the Government price for the land or for the purpose of maintaining the settler thereor while performing the conditions of law. That was the express consideration which entered into the first decision of Secretary Teller upon this subject as thus stated by that officer (1 L. D., 411):

"This law was intended to prevent speculative entries; but if a pioneer settler, struggling for a home for himself and family, is compelled by his necessities temporarily to mortgage his land, that he may pay for it and secure it to himself, and his good faith is manifest, and, in the absence of all fraudulent or illegal purposes, I discover no reason why the Government can reasonably object thereto, or that it is within any prohibition of the law."

And from that date to the present time, wherever there has been a decision to this effect, it will be found that it proceeded upon that theory and was applied to that class of cases alone. Neither the Department nor any court has ever yet held that a mortgage was not prohibited by the act in a case where it appeared, upon its face or otherwise, to be a mere subterfuge for evading the law of Congress.

The case at bar is not a case where the transaction was of a *bona fide* character, even if the contract can be considered a mortgage. It is obviously a pure speculation on the part of White and the claimant to appropriate what was even then supposed to be a valuable tract of iron land. There was no advancement of money to maintain a residence of good faith thereon and no other consideration presenting any equity for consideration.

Counsel for plaintiff in error submit the proposition that by section 2262 of the Revised Statutes no forfeiture is declared on account of the *making* of a contract; that

if such a contract is not in existence at the date of final proof, the applicant can make the required affidavit and prove up his claim, and that a revocation of a contract to convey leaves the same as if no contract had been made.

We deny that this is a correct statement of the law upon this point, and upon the contrary submit that a claimant who has thus attempted to violate the statute and commit a fraud upon the Government cannot, when detected therein, or when fearing detection, thus avoid the consequences of his act.

Counsel, in support of their contention upon this point, upon pages 28 and 29 of their brief, cite six departmental and two court cases. One of said departmental cases, Ward *v.* Williams (10 L. O., 140), we are unable to find in the volume mentioned, or elsewhere. Two other of said departmental citations, Matthiessen and Ward *v.* Williams (3 L. D., 280), and the same case, 6 L. D., 95, are different phases of the same controversy, standing upon peculiar and exceptional facts, the conveyances in question having been made in absolute good faith, for small fractions of a claim, in town lots, to accommodate settlers in a mining camp which had sprung up in a night on a homestead claim, and which quite as suddenly, before final proof, disappeared and the grantees with it. The case was in no sense typical. Another of such departmental cases, referred to only by date but which we identify as Crawford *v.* Fergerson (10 L. D., 275, not 375 as stated), is an authority the other way, wherein the Secretary held that a rescission of such a contract could not be made so as to affect the right of an adverse claimant. Another of said departmental cases, California *v.* Alari (1 L. D., 407; 8 Copp L. O., 140), is a decision of the Commissioner, wherein the fact of rescission did not appear and in which the Commissioner's decision was affirmed by the Secretary (1. L. D., 454, 455) not upon any such

ground, but solely upon the ground that the tract conveyed was so small that it might be overlooked under the maxim *de minimus non curat lex.* The last and only remaining departmental case cited, Aldrich *v.* Anderson (2 L. D., 71), being in fact the only one sustaining the contention of our adversaries, was overruled in Molinari *v.* Scholari (15 L. D., 201) and Tagg *v.* Jensen (16 L. D., 113).

Upon the contrary of this contention the Secretary has repeatedly held, in decisions coming down almost to the present date, that the attempted rescission of such a contract will not relieve an entryman from the effect of his illegal act.

La Bolt *v.* Robinson, 3 L. D. 488, 490.
Etienne *v.* Martel, 6 L. D. 285.
Palmer *v.* Stillman, 18 L. D. 196.
Walker *v.* Clayton, 24 L. D. 79, 80.
Swaze *v.* Suprenant, 24 L. D. 337.
Crawford *v.* Study, 26 L. D. 708.

Larison *v.* Wilbur (N. D.), 47 N. W. R. 381, was a case where, prior to initiation of a pre-emption claim, there had been an oral agreement to convey, which, after the patent had issued, was followed by a written contract containing the same terms. Upon bill filed by the pre-emptor for a specific performance, the defense was that the contract was against law and could not be enforced. The court held against this contention on the ground that the real contract was the one made after patent and that the question of forfeiture, if any there existed, was between the patentee and the United States. There is nothing in the case touching the question of the effect of a rescission.

Simpson *v.* Applegate (Cal.), 17 Pa. Rep. 237, is the only case cited, departmental or court, which sustains the proposition of our adversaries.

In that case a contract had been made, but, prior to final proof, had been rescinded upon discovery of the fact, on the part of the claimant, that it was in violation of law. The court held the claimant entitled to make final proof, upon this condition of fact, but, in delivering its opinion, the court (at p. 238) said:

"The finding that the parties rescinded their contract in order to qualify the defendant to become a witness on the application for the patent must be taken to mean an effectual rescission. There is nothing in the record to show that they did not intend it to be such; and, if the record had shown that such was not their intention, it cannot for a moment be supposed that any court would countenance such a trick upon the officers of the Land Department, or such trifling with the obligations of an oath."

And, upon the contrary, so far as judicial authorities are concerned, the Supreme Court of Minnesota has announced the doctrine of the line of departmental cases which we have above cited and declared that a recission cannot revest the claimant with a legal status.

St. Peter Company *v.* Bunker, 5 Minn. 192 (Gil. 153).

The principle for which we are contending is illustrated in that class of cases in which this court has declared that contracts in violation of law, or against public policy, cannot be enforced, even although not specially pleaded, and that no consent or stipulation, however solemn or formal, between the parties, can neutralize the effect of the violation of law.

Coppell *v.* Hall, 7 Wall. 542, 558, 559.

Oscanyan *v.* Arms Co., 103 U. S. 261.

In Oscanyan *v.* Hall (*supra*) the court, by Mr. Justice Field (pp. 268, 269), after declaring that the court in such

a case would not be restrained by any defect in pleading, or waiver by the parties, cites, with affirmation and approval, the following language by Mr. Justice Swayne in the prior case of Coppell *v.* Hall:

"Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation."

But of what importance is this consideration in the case at bar? There is no pretence that the contract between Hyde and McDonald and White and Powers has ever been cancelled. In all this litigation, running through all these years, no one of these persons has ever even asserted, still less proven, any such fact. With the exception of Powers, as shown by the record, all three of these persons have repeatedly testified in the case without even once suggesting any revocation of the contract. They have repeatedly endeavored, by inference, to give some particular construction to the instrument, but not once has any one of them denied the fact that such contract is still in existence. In view of this fact, the particular question here under consideration becomes entirely immaterial. The contract, for whatever it contained, was in existence during the period of the departmental legislation; was in existence at the commencement of the case here pending, and is undoubtedly in existence at the present time.

II.

As the Equitable Defence Was Bad on Demurrer, There Is No Further Question Here for Review.

As will appear from our statement of fact, the record in the case at bar shows no questions whatever for the consideration of this court except those predicated, in some way, upon the proposition that the equitable defence set up in the cross-petition was effective. Inasmuch as we have seen that such equitable defence was bad upon demurrer, and that the judgment of the court below must be affirmed, it necessarily follows that this conclusion disposes of the entire case.

The findings of the trial court, both original (Transcript, page 35) and amended (Transcript, pages 38 and 39), are limited to facts arising in the case entirely independent of those set up in the cross-petition. They relate to the ownership of the legal title, to the lease of a portion of the premises to the Bishop Iron Company, to the seizen of said company, to the adverse possession of Hyde and to the fact that Hyde did not claim under any patent or other instrument of conveyance from the United States. These facts are in no way questioned or submitted for review in this court.

The settled case or bill of exceptions (Transcript, page 36) shows the proceedings had at the trial under the issue made by the first subdivision of defendant's answer, to wit, his traverse or denial of the formal declaration in ejectment as contradistinguished from his equitable defense. It recites that the cause came on for trial November 30, 1896; that the mandate of the Supreme Court affirming the action of the court below upon the demurrer to the counter-claim

was on file; that the plaintiff thereupon offered in evidence the patent to Warren dated December 26, 1894; that to this offer the defendant, Hyde, objected as incompetent, immaterial, and irrelevant, and also that the same was void for the reasons set up in the cross-petition, and that said objection was overruled and that defendant excepted. The bill further recites that thereupon the plaintiff offered in evidence conveyances which upon their face conveyed the Warren title under the said patent to the Bishop Iron Company, partly in fee and partly by the lease; and that to each of said last-mentioned offers the defendant objected as incompetent, immaterial, and irrelevant, which objections were overruled and defendant excepted. The objection to the patent and the mesne conveyances on the ground of incompetency, immateriality, and irrelevancy is not relied upon by plaintiff in error in any of his assignments; and as such objection was obviously without merit, no further consideration thereof is necessary. The objection to the admission of the patent was based, as above set forth, entirely upon the ground that it was void *by reason of the facts set up in the equitable defence.* This equitable defence being insufficient, it follows that the objection upon this ground was also without merit and was properly overruled.

The assignments of error Transcript, pages 4 to 7; brief for plaintiff in error, pages 3 to 6) do not point out any other or further supposed errors in the proceedings below and brought here by the writ of error.

It follows that an affirmance by this court of the decision of the court below, on the questions presented by the demurrer, necessarily disposes of all other questions brought here by the writ of error.

III.

Judgment Below Final as to Certain Defendants in Error.

The transcript is somewhat obscure in showing, except as to the Bishop Iron Company, the exact proceedings in the State courts affecting the defendants in error.

It will be recollected that upon filing his cross-petition, Hyde, upon application to the court, under some local statute supposed to be applicable, procured an order bringing into the case certain additional parties as defendants. (Transcript, pages 11 and 12.) The transcript also shows that, on dates in some instances not given, some of the parties included in this order were either served with process or appeared, and so appearing, demurred to the cross-petition. After the return of the case to the trial court, under mandate of the Supreme Court of the State, and after judgment in favor of the Bishop Iron Company had been entered for possession and costs (Transcript, pages 39–40), to wit, March 19, 1897, another judgment against Hyde was entered in the trial court in favor of all the parties brought into the case, as before stated, as defendants to the cross-petition, to wit, Frank W. Forman, Frank B. Forman, Fred F. Huntress, Samuel C. Brown, Frank R. Webber, Henry A. Smith, Joseph A. Sharp, John P. Johnson and N. J. Miller. This judgment recites (Transcript, pages 40 and 41) that the cause had been duly heard upon the demurrers of these defendants; that the court had heard argument of counsel thereon and duly considered the same; that thereafter the court had duly made and filed an order sustaining said demurrers; that no appeal from said order had been taken, and that the time for such appeal had expired. Thereupon, upon motion of attorneys for said cross-

defendants, the judgment orders and decrees that Hyde has no right, title, estate, interest or property in the premises as against said cross-defendants, and that said Hyde is barred and estopped from having or claiming any such right, title, interest, estate or property as against said defendants. This is the final judgment of the trial court from which, so far as these parties are concerned, Hyde appealed to the Supreme Court, and also the judgment, still so far as these parties are concerned, which was affirmed by the Supreme Court and is now before this court upon the writ of error.

In view of the recitations of fact found in this judgment of the trial court, it is submitted that as to all of these defendants to the cross-petition, the judgment of the District Court was final. They were not parties defendant to the original complaint; they were only made parties to the cross-petition or equitable defense of the defendant below; they demurred to such cross-petition; these demurrers were sustained; Hyde took no appeal from the order sustaining the same, and before the final judgment upon the order sustaining these demurrers was entered, the time for appeal to the Supreme Court of the State had expired.

It is obvious that the plaintiff in error could not, by an appeal, within time, from a judgment sustaining the demurrer of the Bishop Iron Company, also carry to the Supreme Court of the State, or afterwards to this court, any question affecting these cross-defendants. The judgment against Hyde as to them must stand irrespective of the merits.

IV.

The Equitable Defence not Before this Court.

It appears from the transcript that upon the filing of the cross-petition or equitable defence (Transcript, pages

13 to 32), the Bishop Iron Company immediately demurred thereto (Transcript, page 32). This left the case with an issue at law as to the questions raised by the demurrer and with issues of fact raised by the balance of the answer traversing the formal declaration in ejectment. (General Statutes of Minnesota, 1894, Sect. 5357.) The order for trying issues of different character, thus combined, is prescribed by the practice act, viz.: first, facts to be tried by a jury; second, facts to be tried by the court; third, issues of law. (Gen. Stat. of Minn., 1894, Sect. 5263.) The trial court appears in this instance to have first disposed of the issue of law raised by the demurrer. That being done, we submit that the usual, ordinary and proper course of procedure would have been to have tried the issues of fact, to have allowed a judgment of the trial court thereafter upon all the issues and to have then appealed to the Supreme Court of the State.

We submit that when, instead of following this course, Hyde filed an appeal from the *order* of the court sustaining the demurrer of the Bishop Iron Company, and thus elected to stand thereon instead of proceeding to the trial of the issues of fact, he is bound by the ultimate decision of the appellate court upon the demurrer whenever such an ultimate decision became final and beyond remedy by way of appeal. When the Supreme Court of the State, with nothing before it but this appeal of Hyde from the order of the court below sustaining the demurrer, affirmed that order, Hyde was concluded forever thereafter, upon that question of law, unless within the time allowed, he elected to stand upon such order of the Supreme Court, accepted final judgment thereon, and therefrom prosecuted his writ of error to this court. This he did not do. The time within which such a proceeding could have been had has long since expired and he now stands in this court with no question for review founded upon his equitable defence.

Even this application did not initiate a contest against the scrip location. "To so hold would be to say that every application to enter land covered by a claim of another initiated a contest against such claim. Such a practice has never obtained—has not the sanction of any rules or regulations of the Department."

Hyde vs. Warren, 15 L. D. 418.

It thus appears from the pleadings in the contests that the only issue in the respective cases was the legality of the scrip locations. In addition to this it is alleged in answer that this was the only issue—that the pre-emption right of Hyde was not before the Secretary (Hyde did not appeal, Eaton alone appealed) and that McDonald had exhausted his pre-emption right on another parcel of land.

To recapitulate, the affidavit of contest—the affidavits of Eaton in refutation thereof—the order of hearing (record pages 25-26)—notice of hearing (record pages 26-27)—the notice of appeal from the decision of local land officer (record page 20)—the decision of the Commissioner (in which it is stated that upon "The charge of their illegality that the case is based" record page 31) all show that the pre-emption rights of Hyde and McDonald were not in issue. Secretary Vilas did not claim that the pre-emption rights of the contestants were in issue. He says: "Their (Hyde and McDonald's) appeals which were sent up with the record from the rejection of their applications appear to bring the whole matter before the Department, *and in the exercise of the power of supervision vested in the Department by law* it seems to be deemed that

upon this disclosure of the facts the proper action should be taken." He further states that a hearing had been had on their pre-emption rights. This is not true, as to Hyde at least,, and is contrary to the positive allegations of the answer. It is alleged in the answer "that prior to the decision of Secretary Vilas no charge was ever made or filed against the right of either Hyde or McDonald to file on any lands as pre-emptors, and on the question of the defendant's good faith in making said application to file on said lands as aforesaid he has never had a hearing or his day in court." (Record page 21.)

The question as to the right of the plaintiff in error to file on these lands as a pre-emptor not being in issue in the contest against the Sioux half breed scrip location and not having been brought before the Secretary by appeal, his decision thereon is mere dictum.

If Hyde's pre-emption right was not in issue as stated by Secretary Vilas himself in Thomas Madigan, 8 L. D., 188, "When the case was first before the department the only point presented by the record was the legality of the entry. There was no application for re-payment and the subject was not properly before the department. I therefore find that the ruling of the department on that question was mere dictum and not of binding force in this proceeding." "The decisions of the Land Department to have any force must be made in the due performance of official duties and in accordance with the usual and regular rules of practice or usages in the Department, *and must be based upon legal evidence*, or upon some

formal inquiry or trial at which the parties to be affected have a fair opportunity of presenting evi dence to support their claim or the rights which they assert."

Puget Mill Co. vs. Brown, 54 Fed. Rep. 991.

"The supervisory or reviewing power of the commissioner of the general land office or of the secretary is not an arbitrary, unlimited or discretionary power, but a power that must be exercised according to law and not in violation or disregard of it."

Bogan vs. Mortgage Co., 63 Fed. Rep., 192.

The Secretary of the Interior has no supervision power in case of contest for the right of pre-emptory unless an appeal as to that right is taken. Section 2273 R. S. U. S. provides "When two or more persons settle on the same tract of land the right of pre-emption shall be in him who made the first settlement, provided such person conforms to the other provisions of the law; and all questions as to the right of pre-emption arising between different settlers shall be determined by the register and receiver of the district within which the land is situated; and appeals from the decision of district officers, in cases of contest for the right of pre-emption, shall be made to the Commissioner of the General Land Office, whose decision shall be final, unless uppeal therefrom be taken to the Secretary of the Interior." This statute gives the Commissioner quasi-judicial power to pass on all contested rights of pre-emption, and where such power is given supervisory power does not exist.

Butterworth vs. U. S., 112 U. S., 50.

By the act of May 29th, 1830 (4 Stat. L., 420) the right of pre-emption was given to certain settlers on public lands. Section 3 required proof of settlement or improvement to be made to the satisfaction of the register and receiver. In Lytle vs. Arkansas, 50 U. S., 9 Howard, 314, it was held that their decision was conclusive upon the question of settlement and improvement, the court saying: "The register and receiver were constituted by the act a tribunal to determine the rights of those who claim pre-emption under it. From their decision no appeal is given. If, therefore, they acted within their powers and sanctioned by the Commissioner and within the law, and the decision cannot be impeached on the ground of fraud or unfairness, it must be considered final." Congress had the power to make the decision of the Commissioner in these matters final unless an appeal was taken, and having done so it deprived the Secretary of the supervisory power which he otherwise would have had. It cannot fairly be said that Congress intended to allow supervisory power to remain in the Secretary over these matters and at the same time say the decision of the Commissioner should be final. The two cannot exist together. Finality in the decision of the Commissioner excludes the idea of supervision on the part of the Secretary. It therefore follows that Secretary Vilas had no power or authority to pass upon the pre-emption right of Hyde, and his decision was *coram non judice.*

In Orchard vs. Alexander, 157 U. S. 372, 39 L. Ed. 737 the rule contended for by us is fully recog-

nized. In that case the question was as to the right of the Commissioner to order a hearing after a pre-emption claimant had proved up before the local land officers, and it was held he had such right—that passing on the proof was the exercise of a ministerial duty only, in a case where there was no contest the court says the approval of proof "Is as much an administrative as a judicial act. There is no contest before the Register and Receiver." Distinguishing it from a case like the one at bar where there was a contest. Again the court says: "If the section declaring that proof in respect to settlement and improvement should be made to the satisfaction of the local land officers stood alone as it formerly did it might well be contended that as the local land officers were the ones to whose determination the question of settlement and improvement was confided, and as there was no statute granting any review of their determinations, they must be taken as final. It is of course competent for congress to give finality to their determinations, and having given them power to determine and made no provision for review it naturally followed that their judgment was final." Congress has made the decision of the commissioner final in all matters relating to contested pre-emption claims unless appeal is taken, thereby segregating this class of claims "From the scope of the general system of public land law and placed it outside and beyond any supervising control of the Secretary."

The testimony relating to the contract was not in the Hyde case. Admitting that the question as to the right of the plaintiff in error to file on the land

as a pre-emptor was in issue the testimony as to the contract was taken in the McDonald case and by stipulation went into the Hyde case for the sole purpose of determining the legality of scrip location No. 19 D. It therefore could not be used for any other purpose. It would be unfair and unjust to use this testimony to determine any question other than the legality of the scrip location. When the stipulation was made Hyde had no reason to expect it would be used for any other purpose. Did he contemplate it would be he undoubtedly would not have made such a stipulation. His testimony read correctly did not show an illegal contract. and the testimony of McDonald taken in another case could not be binding upon him, admitting for the sake of argument that the McDonald testimony shows an illegal contract.

The testimony taken as a whole shows that the contract was one for security, and if so, it was not a prohibited contract under Section 2262, R. S. U. S.

Norris vs. Heald, 12 Montana, 282.
Stewart vs. Powell, 98 Cal., 514.
Wilcox vs. Johnson, 21 Col., 369.
Spies vs. Newberg, 71 Wis., 279.
Lang vs. Morrey, 40 Minn., 369.
Larson vs. Wiesbecker, 1 L. D., 409.
Young vs. Arnold, 5 L. D., 701.
Wm. H. Ray, 6 L. D., 340.
Midget vs. Ry. Co., 8 L. D., 243.
Alonzo W. Graves, 11 L. D., 283.
Murdock vs. Furgerson, 13 L. D., 198.

Whatever the form of the contract was, if intended as security it would amount to a mortgage.

Meighen vs. King, 31 Minn., 115.

Jones vs. Blake, 33 Minn., 363.

And where there is any doubt as to what the transaction is, the court will construe it as a mortgage.

Rockwell vs. Humphrey, 57 Wis., 410, and cases cited.

In order to decide as he did Secretary Vilas considered it necessary that the testimony should show *conclusively* that the contestants had made a contract which *absolutely* prevented them from ever obtaining land under the pre-emption law. Now it is clear that the testimony does not show this. The testimony is perfectly consistent with an agreement to give a mortgage on one-half of the land, and on a hearing if said agreement was produced it is plain that they would not be absolutely prevented from taking the oath required by section 2262 R. S. U. S.

Section 2262 R. S. U. S. only provides for a forfeiture in case the pre-emptor swears falsely. There is no forfeiture on account of the making of a contract, and if such a contract is not in existence when he comes to make proof he can make the proper affidavit and prove up.

In 1883 Secretary Teller held that a contract for the future conveyance of a homestead is void and will not affect the legal status of the claimant, that only an absolute conveyance will defeat his rights.

Aldrich vs. Anderson, 2 L. D. 71.

In July, 1884, he made a similar ruling.

Mathiason and Ward vs. Williams, 3 L. D. 282.

In 1887 it was held by Secretary Lamar that a

contract to convey a part of a homestead did not invalidate an entry.

Mathiason and Ward vs. Williams, 6 L. D. 95.

In the latter case there was a conveyance of a part of the land of record, but there had been a revocation of the contract. Aldrich vs. Anderson, 2 L. D. 71 is approved of and the Secretary says "I have given this matter full and careful consideration, and independent of the weight which should be given to prior decisions in the case, I am satisfied that my decision should not be disturbed. This case was approved of March 7th, 1890, 10 L. D. 375.

A revocation of a contract to convey leaves the matter the same as if no contract had been made.

Simpson vs. Applegate, 17 Pac. 237.
Cal. vs. Allen 8 Land Owner, 140.
Ward vs. Williams, 10 Land Owner, 526.
47 N. W. 382.
Anderson vs. Aldrich, 2 L. D. 71.

Such being the construction given this statute by the Department in reference to contracts to convey, it became a rule of property and Secretary Vilas had no right to apply a different rule to a case initiated prior to his decision.

Germania Iron Co. vs. James, 89 Fed. Rep. 811.

Secretary Noble should have granted the motion to reconsider the decision of Secretary Vilas. "Motions for review or reconsideration of the decisions of the Secretary will be allowed in accordance with legal principles applicable to motions for new trials

at law after due notice to opposing parties." Rules of Practice, Rule 76.

Misconduct antecedent to the weighing of testimony which affects the weight to be given to it is ground for a new trial.

Kruidenier vs. Shields, 30 N. W. R., 681.

Where it clearly appears that a witness has made a mistake in giving his testimony which is material to the issue and which probably affected the verdict, a new trial will be granted.

16 Am. & Eng. Ency. of Law, 551, and cases cited.

Where transcript of a record is introduced on a trial and it is subsequently discovered to be erroneous, it is ground for a new trial.

Farnham vs. Jones, 32 Minn., 7; 19 N. W. R., 83.

Thomas vs. Hutchinson, 25 Ark., 558.

Reenell vs. Reed, 32 Minn., 45; 19 N. W. R., 286.

The Secretary refused to grant a re-hearing on the ground that there was *some* evidence to sustain the finding of Secretary Vilas and that it was not shown that such finding was against the palpable preponderance of evidence. In other words, he adopted the rule applicable to motions for a new trial in court, on the ground that the verdict is contrary to the evidence. Under the authorities above cited this was clearly erroneous. The adoption of such a rule prevented the plaintiff in error from having a hearing on the evidence as it in fact was. Secretary Vilas made a mistake in reference to the testimony of the plaintiff

in error so as to make it appear that he testified directly opposite to what he did and on the evidence so mistaken made his decision. His testimony correctly read did not show a prohibited contract. An original decision on the evidence correctly read has never been made. Instead of the Secretary adopting the rule he did, he should have considered the whole evidence with the burden of proof upon those who attacked the defendant's good faith. Had he done so, equity and justice to Hyde required that he be given an opportunity to meet the charge of bad faith, and that he should not be bound by a conclusion drawn from McDonald's testimony and his own perverted in another case. To thus deprive the plaintiff in error of his rights was a violation of the plainest principles of equity. Such a course of procedure in a court of justice would be without justification. To hold that a party should not on a motion for a new trial be relieved from a finding of the court made on false testimony, false because mistaken, on the ground that there was *some* evidence to sustain the finding would be to ignore all other evidence than that which tended to sustain the finding. It would operate to deprive a party of his rights by mistake. Such a rule has no sanction in reason, law or equity.

The State Supreme Court proceeded on a mistaken view of the facts and an erroneous idea of the law. It says, in speaking of the order of hearing in the contest between Hyde and Warren "February 18th, 1889, the Secretary of the Interior revoked the same." It is alleged, as heretofore stated, that this was done by the Commissioner of the General Land Office.

The Court then say: "It would be somewhat remarkable if the Commissioner should act upon a motion to set aside an order made by the Secretary, his superior officer." The irrelevancy of this remark is apparent in view of the mis-statement of fact made by the Court, and even had the Court correctly stated the fact the remark is not justified for the Secretary is not the Commissioner's "Superior Officer" when contested pre-emption rights are involved unless an appeal is taken. The StateCourt also erroneously assumed that Hyde and McDonald were joint contestants of both S. H. B. scrip locations. It says: "It appears that these contests were initiated and prosecuted by McDonald and defendant (Hyde) jointly, and the testimony was in this case actually taken without objection either as bearing upon an issue which the parties last named had volunteered to litigate or as properly being within the issues—always tried without pleadings in land contests and in proceedings much more informal than in a court of justice—and thus competent and material in all respects. If the defendant desired to exclude this particular testimony he should have so stipulated. The evidence was in both cases without objection or reservation. He thus waived the irregularity if any there was. The testimony was before the land officers for all legitimate purposes. They determined the question of fact presented and there is no reason why we should disturb the finding." (Record, page 48.) This statement will hardly bear analysis. If contests "Are always tried without pleadings" it is hardly proper to speak of an issue "As properly being within the

issues." If Hyde and McDonald jointly contested both scrip locations there would not be two cases, and the statement that "The evidence was in both cases without objection or reservation" shows that the Court reasoned part of the time as if there was only one joint contest, and part of the time as if there were two separate cases. And again if they were joint contestants and that fact would make the testimony competent in the Hyde case, why was a stipulation made or necessary? Without the stipulation it is clear that the testimony would not be in the Hyde case, and the statement that "if the defendant desired to exclude this particular testimony he should have so stipulated" assumes that it was in his case without stipulation. It is difficult to conceive just what the Court had in mind or how it reasoned this testimony into the Hyde case so as to make it necessary for Hyde to stipulate it out. It is evident that the Court was laboring under a mis-conception of the facts.

The facts are as alleged, there were two independent contests, one by Hyde and the other by McDonald. That without a stipulation no testimony was in the Hyde case, and by virtue of a stipulation the testimony taken in the McDonald case went into that case for the sole purpose of determining the *legality* of scrip location No. 19 D, and this was all the "legitimate purposes" for which it could be used. This decision, therefore, is unsound, as being based upon a mistaken view of the facts and of the law. Admitting that Hyde and McDonald were joint contestants against the separate scrip locations, there

would be two cases and the testimony taken in what is called the McDonald case would not be in what is called the Hyde case without the stipulation. The whole question therefore turns on whether or not this testimony being stipulated into the Hyde case for the sole purpose of determining the legality of the scrip location in that case could be used for any other purpose. We contend that it could not, and to use it for any other purpose was going beyond the scope and intent of the stipulation. It was limited to that purpose and that only, and could not properly be used for any other purpose. Hence the question is not whether the Secretary made a proper finding on this evidence, but whether he had any right or authority to consider it at all in determining the Hyde case.

It is indeed a strange result if Mr. Hyde can be deprived of a valuable property right in the forty acre tract in question in a contest proceeding initiated by him against the location of the S. H. B. to other lands in the same quarter section, when as stated in the counter claim no charge had been made against his qualifications to enter the land his possession. occupation and improvements of the same. When no evidence was given upon that subject save that stipulated in to "be considered in determining the validity of the location of scrip 19 D." (Record 20.)

The meaning of this stipulation is clear and unequivocal and the language of the Supreme Court of Minnesota about the testimony coming in without objection for all purposes (Record 46) is as inaccurate as the further statement on page 48 that the contests of McDonald and the defendant were initiated and

prosecuted jointly when it appears that they related to different lands (Record 16 and 17), and so far as appears there was nothing in common except perhaps that both contests were against location of S. H. B. scrip by one Eaton. There is nothing in the case warranting an extension of this stipulation beyond what it imports upon its face, i e, that the evidence was to be considered in determining the validity of the scrip location.

Secretary Vilas seems to have been misled into believing that such appeal was then before him (Record 21). Manifestly a decision made under such a mistake should not be deemed conclusive against the allegations of the equitable counterclaim all of which stand admitted in the reply. (Record 34.)

Furthermore, it appears that on motion for review, Secretary Noble modified the decision of Secretary Vilas to the extent that the same should not determine the preference right of Mr. Hyde, yet at every step both before and after such modification the ruling of Secretary Vilas is placed as a barrier before him—he is denied the right to contest the Warren entry (Record 16 and 22). Notwithstanding the commissioner's order for a hearing thereon and his motion to set aside the revocation is silently neglected (Record 22). He is ruled out of the Hartman contest and denied all right to participate therein or claim said lands—Why? By reason of any new evidence or because he had not properly occupied and improved the land? Not at all; on the contrary this action of ejectment admits he is in possession and no question is made of his residence or im-

provements, but the decision of Secretary Vilas, notwithstanding its modification, like Banquo's ghost, will not down. A decision made by mistake of what was before him upon evidence not there for any such purpose in a contest upon other land.

The counterclaim herein is the same as a bill of complaint in equity and all the allegations stand confessed including those on page 21 as to the mistake of Secretary Vilas in believing that the appeals of Hyde and McDonald were before him while no such issue was then pending; that there was a mistake in the testimony, and by reason of such mistake the Secretary erroneously and contrary to law decided that Mr. Hyde could not make the affidavit, and therefore found against him.

Is this not such a mistake as clearly comes within the power of a court of equity to give relief? Suppose there had crept by mistake into this case an affidavit taken in another contest, between other parties bearing the same names, and it was alleged in the bill that such evidence was considered by the Secretary and by reason thereof he erroneously and contrary to law decided that the party had forfeited his rights, would it not be strictly within the province of a court of equity to correct the error? Certainly the authorities so lay down the rule.

Johnson vs. Towsley, 13 Wall, 72.
Moore vs. Robbins, 96 U. S., 530.
Roy vs. Railway Co., 173 U. S., 587.

In Lee vs. Johnson, 116 U. S., 48, the court says: "that in contested matters before the land departments as in those before the courts, the de-

cision should be confined to the questions raised by the allegations of the respective parties."

Yet it is here sought to deprive the plaintiff in in error of his property by a decision made upon the appeal of the other party involving the legality of his location of S. H. B. scrip, where the plaintiff in error's claim was not in issue, when his appeal was not heard by or pending before the secretary, upon evidence to be considered for another purpose, and incorrectly set out. Surely if there is no remedy it is a consummation not to be wished but greatly to be deplored.

This court has repeadly held that where injustice has been done a court of equity will inquire into the *facts* as well as the law notwithstanding the decision of the Land Department.

Cunningham vs. Ashley, 14 How. U. S. 377.
Linsley vs. Hawes, 67 U. S. 267.
Barnard vs. Ashley, 18 How. 40.
Lytle vs. Arkansas, 22 How. 192.
State of Minn. vs. Batchelder, 1 Wallace 115
Shepley vs. Cowen, 1 Otto, 330; 91 U. S. 424.
Moore vs. Robins, 96 U. S. 535.
Railway vs. Smith, 76 U. S. 95.
Stewart vs. McHenry, 159 U. S. 643.

In State vs. Batchelder supra the Court says: "These questions have been so often before the court, and so fully considered in the last case of Lindsley vs. Hawes, where the authorities are collected, that it would be a waste of time to examine them. A court of equity will look into the proceedings before a Register or Receiver, and even into those of the land office or other offices where the right of property of a

party is involved, and correct errors of law or of *fact* to his prejudice." Mr. Justice Miller in Johnson vs. Towsley, 80 U. S. 72 says: "And so, if for any other reason recognized by courts of equity, as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience, and by the laws which congress has made on the subject, it ought to go to another, 'a court of equity will,' in the language of this court in the case of Stark vs. Starrs, just cited, convert him into a trustee of the true owner and compel him to convey the legal title." In Rector vs. Gibbon, 111 U. S. 276 the Court says: "That the action of the land office in issuing a patent for any of the public lands, subject to sale by pre-emption or otherwise, is conclusive of the *legal title*, must be admitted under the principle above stated; and in all courts, and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court, or the essential character of the proceedings, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand, there has always existed in *courts of equity* the power in certain classes of cases to inquire into and correct *mistakes, injustice and wrong*, in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown, or other executive branch of the government, have been corrected or declared void, or other

relief granted. No reason is perceived why the action of the land office should constitute an exception to this principle. In dealing with the public domain under the system of laws enacted by congress for their management and sale, that tribunal decides upon private rights of great value, and very often, from the nature of its functions, this is by a proceeding essentially ex parte, and peculiarly liable to the influence of frauds, false swearing and mistakes. These are among the most ancient and well established grounds of the special jurisdiction of courts of equity just referred to, and the necessity and value of that jurisdiction are nowhere better exemplified than in its application to cases arising in the land office."

The application of the plaintiff in error to enter the land in controversy, although it embraced other lands not subject to entry, was sufficient. The forty in controversy, at the time the application was made, was subject to entry, and the validity of his application was not affected by the fact that the other three forties included in it were not subject to entry.

Cornelius vs. Kassel, 128 U. S., 456.
Sender vs. Kemp, 83 Mo., 588.

In the former of these cases Davidson entered forty acres of land with another tract. It was afterwards discovered that such other tract was not subject to entry, and the commissioner of the general land office cancelled the entry of Davidson for the two tracts of land on the alleged ground that one of them was included in a prior grant to the state, and therefore was not subject to entry. The court held that such action was erroneous, and says: "The forty acres in controversy

were subject to entry when Davidson entered them together with another tract. The validity of the entry of those acres was not affected by the fact that the second tract belonged to the state of Wisconsin under the Swamp Land Grant, and was not therefore subject to the disposal of the United States." See Sanderson vs. Taylor, 14 L. D., 489; Denaha vs. Holdman, 11 L. D., 409; John W. Webber 12 L. D. 563; Wilson vs. Davis, 5 L. D., 376; State vs. Dorr, 2 L. D., 637; Angus McDonald vs. Emil Hartman et al, — L. D , — (Decided Dec. 21, '94). In the latter case the aplication of Alden, although it embraced a tract which was not contiguous to the land he desired to enter, was held sufficient.

In Hendrick vs Beeler, 19 S. W. R. 492, it was held that when "One attempts to enter a particular tract of land, then vacant and subject to entry, and, with the intention of doing so, pays his money or delivers a warrant to the proper government officers he acquires an equity in the land, though the written application, required to be made by mistake and error in writing it, should mis-describe the land and wholly omit the tract intended; and that this equity may be fully enforced againt one who afterwards with knowledge of the facts which establish the equity, obtains the legal title from the United States to the same land." In the case at bar the plaintiff in error, as appears from the answer, informed the land officers that he intended to enter the forty in question even though he were not successful in his contest against the other three forties, and April 10th, 1886, when he contested the Chippewa Scrip selection made an

election if any was necessary. There is no question as to the land intended to be entered, nor that the defendant in error took with notice of Hyde's claim.

We submit that the plaintiff in error in equity and good conscience is entitled to the land in controversy. He has done everything that was within his power to do, and is entitled to the land unless it be for this alleged illegal contract. His testimony if to be considered shows that he made a contract which was not prohibited. It is alleged in the answer and admitted that he made the application to enter the land in good faith, and that with the law properly administered, patent would have issued to him. By mistaking his testimony and making it to read directly contrary to what it in fact was and by the assumption of jurisdiction and authority on the part of Secretary Vilas, which he did not possess, he has been deprived of this land. If these decisions are to be sanctioned, there is no right of property, however sacred, that is secure, and there will be no assurance that a man, let him act never so honestly, in his attempt to acquire public land, can obtain the same. The history of the land department does not furnish another instance of such a flagrant violation of the rights of an individual. The question in controversy in this case is not so much the value of the property herein involved as it is the principle. It rests with this court to say whether or not an individual who himself has done nothing wrong can be arbitrarily deprived of his rights, by the land department, and have no redress in the courts. That a mistake has been made is admitted; that an injustice and wrong

has been done to the plaintiff in error is apparent; that, in equity and good conscience, he is entitled to the land cannot be denied. We, therefore submit that the decision of the state supreme court should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

BISHOP IRON COMPANY,
Defendant in error,
vs.
THOMAS W. HYDE,
Plaintiff in error.

No. 126.

In Error to the Supreme Court of the State of Minnesota.

BRIEF IN REPLY OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

1. All the demurrers of the defendants, excepting that of Frank B. Forman and Frank W. Forman and of Frank R. Webber were before the Supreme Court on the first appeal. Printed record 24-33-34-42. Original record. 174-5-6.

2. The forty in controversy was not included in the S. H. B. Scrip locations. The description of

these locations is given on page 25 of the printed record. When this description was made it was supposed that Section 30 would be of regular size. Taking this into consideration it will be seen that the descriptions there given cover exactly the same land as shown on the diagram used on the oral argument and which S. H. B. Scrip locations covered when adjusted. Hence, counsel's statement on the oral argument that the S. H. B. Scrip covered the forty in controversy is not correct

3. Counsel on page 12 of their brief do not state our assignments of error correctly. However, this is immaterial, for where the case is an important one and the merits have been fully discussed and presented the Court will consider the case even though the assignments of error are defective.

Fladger vs. Kidd, 78 Fed. 341.
O'Neil vs. Vermont, 144 U. S. 323.

4. When Warren's selection was made the record was not clear, as stated by counsel (brief 26-27). Hyde's application to file a declaratory statement was made July 20th, 1885, nearly two months previous. The date of Warren's selection is given by counsel (brief 98) as April 15, 1885. It should be October 15th, 1885.

5. On page 31 of counsel's brief it is assumed that all decisions which he asks the Court to take judicial notice of, except one, are referred to in the answer. No reference is made in the answer to the commissioner's decision of September 8, 1893, appendix No. 3, nor to Secretary Smith's decision 19 L. D 547, appendix No. 4.

6. The filing of a reply by plaintiff was a waiver of its demurrer. 6 Ency. Pl. & Pr., 385.

7. Counsel statement on page 91 of his brief to the effect that Hyde never suggested "That the entire testimony taken on the point in question did not embrace both Hyde and McDonald" and that "prior to the filing of the cross petition in the case at bar it seems to have been assumed by all sides that the stipulation carried into the whole case the whole testimony, and made the same applicable to Hyde as well as McDonald." It was necessary for counsel to go outside of the record to make this statement. It is not true in fact. As shown by the brief which I exhibited on the oral argument wherein that point was specifically made by me.

8. On page 91 it is stated that the register and receiver in Hyde vs. Stram decided "All claims." If by this it is intended to say they passed on the pre-emption right of Hyde it is not correct, for they did not do so. It is true that the appeal of Eaton took all the papers in the record to the secretary's office, but Hyde's appeal from the rejection of his application to file as a pre-emptor on the forty in controversy was not a part of the record in that case. It was before the commissioner for determination and was acted upon, that is, it was an element on which the commissioner based his order of contest in Hyde vs. Warren Dec. 22, 1888. His appeal was there long after the papers in the regular course of business on Eaton's appeal had gone to the office of the Secretary of the Interior. In some irregular manner the appeal reached the secretary's office, and

as we contend was "a mere excresence" in that record.

9. On page 94 of Counsel's brief it is assumed that Hyde was a party to McDonald's proceedings against scrip location, and it is said that if he were not he went on the stand and testified and heard "the damaging testimony which shows his claim to be illegal," and that his own testimony showed his claim to be invalid. There is nothing in the record to show that Hyde was a party to McDonald's contest. Hyde's testimony did not show his claim to be illegal. The doctrine of estoppel has no application whatever to the case. Hyde had no reason to believe that the testimony was damaging. His conception of the contract would not lead him to believe that it was, and he was under no obligation to interpose in that case or make any defense. It is not shown that he was even present while the McDonald testimony was being given.

10. On page 99 of counsel's brief it is stated that when the Commissioner ordered a hearing upon the Hyde application to contest the Warren selection "Hyde's entire preemption claim upon which alone the application to contest was based, was pending before Secretary Vilas upon the voluminous testimony taken in the prior case, and was there awaiting such disposition as that officer should make of the matter." This is contrary to the express allegations of the answer. We allege that his appeal "was not before the Secretary," that "he has never had a hearing or his day in court," and "that the defendant never had a hearing on his right to file on the land

as a preemptor" (record 21). Again it is clear that the two proceedings were entirely separate, and that the appeal in fact was before the Commissioner. Again it is not true that his application to contest the Sioux Half Breed Scrip was based on his pre-emption claim.

11. Counsel on oral argument stated that the defendants in error were bona fide purchasers in good faith. In the answer it is alleged (record 24) "that each and all of said parties, including the plaintiff, had knowledge and notice of the claims of the defendant prior to the issuing of said patent to said Warren, and the time they respectively acquired their and each of their alleged interest." Again Hyde was in possession of the land, and this was notice to the world of his rights.

12. Neither the Vilas decision nor the decision of the Commissioner dated September 8th, 1893, appendix 3, were published or referred to in the answer; hence judicial notice of them cannot be taken. It is stated by counsel in the oral argument that the reason the Vilas decision was not published was because the case was consolidated with several others. This does not appear from the record in this case.

ARGUMENT.

We objected to the use of matters not properly of record for the reason that they tend to encumber the record and confuse the question before the court. We especially contend that the court cannot take judicial notice of the commissioner's decision above mantioned. He is not the head of the department

and would not come under the rule contended for by counsel. Again his decision as to the illegal contract was mere dictum, he having held that the Vilas decision was *res adjudicata* on that question. Again, Hyde appealed from that decision and the Secretary did not hold that there was an illegal contract. He held that they were not contestants, and that that was the only question in the case, and on that the Vilas decision was *res adjudicata*. Now the only force and effect which can be given to Secretary Smith's decision is that it holds as a matter of law that neither Hyde nor McDonald were contestants, but adverse pre-emption claimants. This holding is in direct conflict with the entire record in the case.

To recapitulate, (1) it is alleged in the answer that the scrip was contested on the ground that it was illegally located; (2) the Commissioner ordered a hearing on that ground; (3) the notice of hearing was issued on that theory; (4) the register and receiver decided only the legality of the scrip locations; (5) the Commissioner on appeal states that the case was based on the charge of the illegality of the locations and onthat ground cancelled them; (6) Vilas affirmed the decision of the Commissioner on the same ground, and (7) Secretary Noble modified the Vilas decision on the ground that they were contestants under the Act of May 14th, 1880. If there is any one fact that the records and proceedings show it is the fact that Hyde and McDonald were contestants of Sioux Half Breed Scrip location and not adverse pre-emption claimants. Hyde's right to the forty in controversy was not affected by this decision.

His rights were terminated by the department, before that decision was made and a patent to the land ordered to be issued to Warren.

The court will not take judicial notice of the facts contained in decisions of cases other than the one before it for consideration, nor of facts in any case recited in decisions other than those *in which the public are inte ested* The cases cited by counsel do not go to the extent claimed by him. All that is held in Caha vs. U. S. 152 U. S. 211 is that the court will take judicial notice of the *rules* of the department. In Heath vs. Wallace, 138 U. S. 578, that the court will take judicial notice of the plat of survey in the general land office. Such plat is a public record and the court would take judicial notice of it without the recital of it in a departmenta decision.

12 Ency. of Law, 171, note 1.
1 Jones Ev. §128.

In Jones vs. U. S. 137 U. S., 202 all that is held is that the court will take judicial notice of statements made by the head of one of the branches of the executive department when they relate to public *to public records* under his control. In Knight vs. U. S. Land Ass'n, 142 U. S. 161, the facts which the court stated it would take judicial notice of "were not contrary to the findings" in the case and were simply alluded to to shed light upon such findings and not to contradict them. In Johnson vs. Drew 171 U. S. 92 all that was held is that the court will take judicial notice of the plat of public survey on file in the general land office. This

as stated before it will do without a recital in a decision.

That courts will take judical notice of their own records cannot be denied, but they will not take judicial notice of facts relating to *private matters* in one case on the trial of another when such decision has not been offered or introduced in evidence.

McCormick vs. Herndon, 67 Wis., 648.
In re Manderson, 51 Fed., 501.
Vassault vs. Leitz, 31 Cal., 225.
Haver vs. Clanberg, 3 Mo. App, 342.
Esterbrook vs. Steel Pen Mfg. Co., 30 N. J. Eq., 341.
Lake Merced Water Co. vs. Cowles, 31 Cal., 215.
State vs. Edwards, 19 Mo., 674.
Daniel vs. Bellamy, 91 N. C., 78.
Enix vs. Miller, 54 Iowa, 551.
Baker vs. Mygatt, 14 Iowa, 131.
Bond vs. White, 24 Kansas, 45.

The true rule seems to be that the court will take judicial notice of the acts of public functionaries contained in public documents published by public authority when they relate to *the affairs of government*, and will not take notice of such matters which have no relation thereto.

1 Greenleaf on Evidence, Section 492.

Again R. S. U. S., Sections 882,891, provide for copies of documents in the office of the Secretary of the Interior and the Commissioner of the General Land Office, and give them the same force and effect as originals. The rule in the

Department of the Interior is that neither the evidence nor the findings thereon in one case shall be considered on the final adjudication of another and independent case where such evidence was not offered at the hearing in the latter case.

Bright vs. Elkhorn Mining Co., 9 L. D., 503.

Again, Hyde's rights to the forty in controversy were not determined by the decision of Secretary Smith, but in another and independent proceeding, and because of Vilas' and Noble's decisions. The State Supreme Court did not consider Secretary Smith's decision. This is evident from the opinion. It is not even alluded to by the State court. It has never been urged or suggested in this case until counsel filed his brief in this court. The Land Department not having considered it as a fact in determining the Hyde case as to this forty or otherwise, and the State court not having done so, it should not be considered here, for this court will only take judicial notice of what the State court did.

Hanley vs Danohue, 116 U. S., I.

Bernard vs. Abbott, 116 U. S., 277.

Secretary Noble's decision In Hyde vs. Eaton, et al, 12 L. D. 157, as before stated Hyde's rights as a pre-emptor not being in issue before the department could dispose of the same and its decision be conclusive it was essential that it conclusively and absolutely appear that he could not succeed no matter what the nature and character of evidence he might produce in his contest against the Warren selection.

Lee vs. Johnson, 116 U. S. 48.

Secretary Vilas considered such right by virtue

of his supervisory power and Secretary Noble had no other question so far as the pre-emption rights were concerned before him than; Was Secretary Vilas' opinion on that feature of the case warranted? It is clear that without the affidavits he should have granted a re-hearing on the ground of the mistake which had been made. The filing of the affidavits did not put the question as to the pre-emption rights in issue if they were not in issue before. Hyde and McDonald specially urged before him that their pre-emption claims were not in issue. (12 L. D. 159) The filing of the affidavits we think cannot be construed as an implied submission of a question to the consideration of which they objected. The consideration of the pre-emption rights by Secretary Vilas was a mere academic question. He directed no formal judgment thereon. Neither did Secretary Noble. He simply refused to consider further the pre-emption claims.

The final judgment of Secretary Vilas was to throw the land open to entry by the first legal applicant. The judgment of Secretary Noble was to modify Secretary Vilas' decision "to the extent of saying that the preference right of entry in either of these parties is not decided." Did this not allow them to apply to enter the land in any form they chose? What more could he have done? This judgment is as ample and complete as it could have been made. The preference right to enter included the right to enter the land as pre-emptors. Therefore Secretary Noble left that question open and particularly refrained from expressing an opinion thereon. But if it be held that the filing of the affidavits was

a submission of the question as to the contract to Secretary Noble, then we say that on such affidavits there was but one decision which could be made, and that was that there was not an illegal contract, and the finding of the secretary, if it can be called such, contrary to this undisputed evidence is not binding on the court. As was said by Justice Miller in Marquis vs. Frisbie, 101 U. S. 437, "if it can be made entirely plain to a court of equity that on the facts about which there is no dispute or no reasonable doubt those officers have by mistake of law deprived a man of his right, it will give relief."

But we submit that the most that can be said of the filing of these affidavits is that they were before Secretary Noble in the same manner as they would be before Secretary Vilas to determine one question, and that was, whether the evidence in reference to the contract showed conclusively that an illegal contract had been made. That they do this will not be contended for a moment. Hence the finding thereon on a question not in issue is not binding on the court.

Counsel in his brief has entirely failed to discuss the point made in our brief to the effect that in a contest for the right of pre-emption under Sec. 2273 R. S. U. S. the register and receiver should first decide the question, then the Commissioner of the general land office, whose decision is final unless an appeal is taken.

If it be held by this court that the commissioner of the general land office in his decision of August 4th, 1888 (record 28-32, see page 31, fol. 62-63) re-

jected the application of Hyde to file so far as it related to Lots 5 and 6 and the SE. ¼ of NW. ¼ of Section 30, then it is clear that the pre-emption right of Hyde was not before Secretary Vilas nor was it before Secretary Noble. The decision of the Commissioner thereon would be final, and that was the rejection of such application because it did not antadate the location of the scrip.

It was proper to do what was done submit the counter-claim and principal action to the court at one time.

Miners' Bank vs. W. S. 5 How. U. S. 213.
Ayers vs. Carver 17 How. U.S. 591.

On an appeal from a judgment the Supreme Court of Minnesota "may review any intermediate order involving the merits or necessarily affecting the judgment."

General Statute Minnesota, 1894, Sec. 6140.

In conclusion we submit that on a general view of the whole case it appears that Hyde has never admitted or testified to an illegal contract—that he has never been called to meet such a charge for none was ever made—that he has persistently and repeatedly applied to be heard on that question and been denied that the only proceedings in which evidence was taken where the question could be said to be in issue resulted in Secretary Smith's decision and he falls back on the Vilas decision, and does not find on that question—hence there is no decision of the department to the effect that there was an illegal contract other than the opinion of Secretary Vilas and the refusal of Setretary Noble to take further action

in reference thereto. He has been deprived of his rights because of the testimony of another and his own perverted in another case in a proceeding where the question was not in issue. We submit that this is not "due process of law" and that is inequitable and unjust. Such proceedings does not command our respect for the law nor evidence the purity of its administration which Chief Justice Marshall says "comes home in its effects to every man's fireside and passes upon his property, his reputation, his life, his all."

We submit that after nearly sixteen years of terrible struggle to maintain his rights and defend his home and his name against fearful odds that he should not by the judgment of this court be deprived of his property and branded as a perjurer and a conspirator to defraud the government unless the record clearly warrants such a judgment. We submit that it does not.

L. A. PRADT and JOHN BRENNAN,
Attys. for Plaintiff in Error.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

No. 126.

Brief of Redington for Hallogg

IN THE

Supreme Court of the United States.

For D.C.

OCTOBER TERM, 1899.

Filed Jan. 25, 1900.

THOMAS W. HYDE,
PLAINTIFF IN ERROR,

v.

BISHOP IRON COMPANY, ET AL.,
DEFENDANTS IN ERROR.

} No. 126.

In Error to the Supreme Court of the State of Minnesota.

BRIEF FOR DEFENDANTS IN ERROR.

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WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
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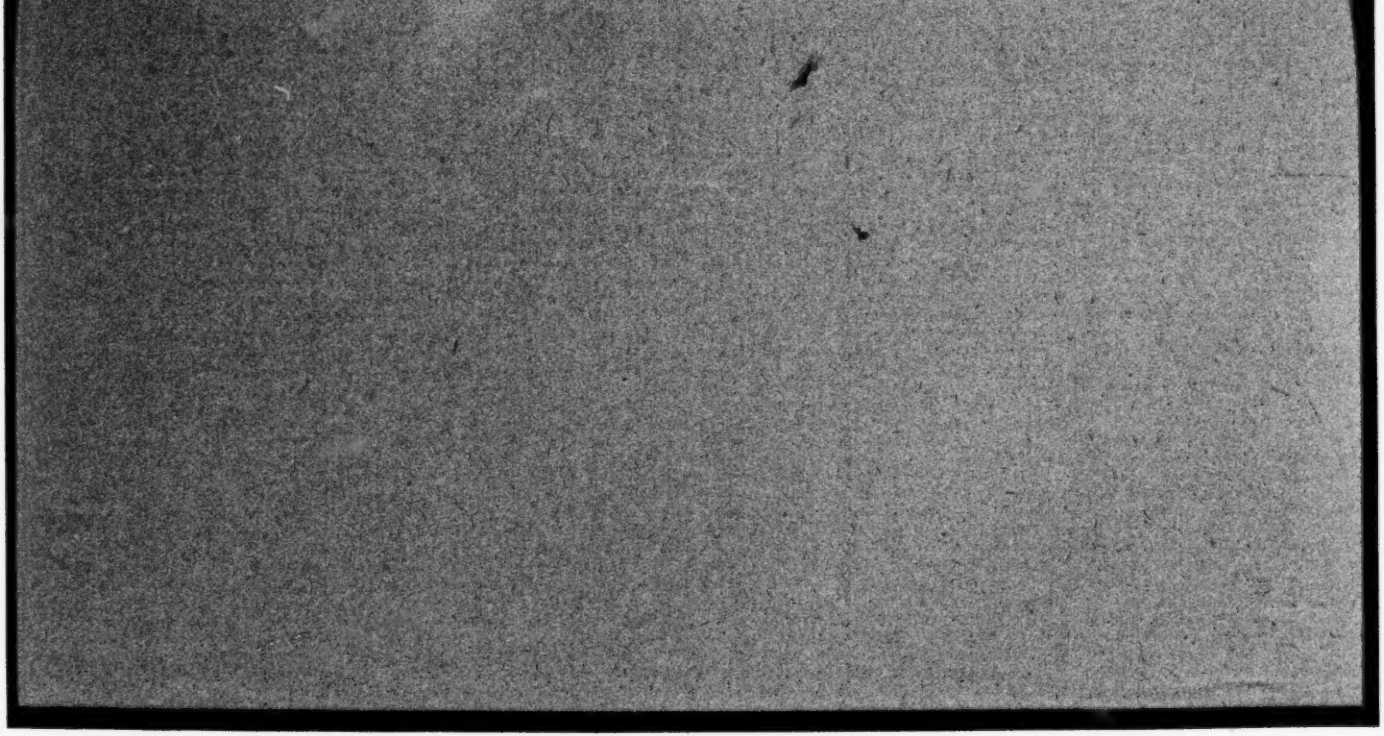

IN THE

Supreme Court of the United States.

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THOMAS W. HYDE,
PLAINTIFF IN ERROR,

v.

BISHOP IRON COMPANY *et al.*,
DEFENDANTS IN ERROR.

No. 126.

In Error to the Supreme Court of the State of Minnesota.

BRIEF FOR DEFENDANT IN ERROR, THE BISHOP IRON COMPANY.

STATEMENT OF CASE.

The case at bar is ejectment, or the equivalent possessory action for recovery of real estate under the laws of Minnesota, brought by the defendant in error, the Bishop Iron Company, against the plaintiff in error, Thomas W. Hyde. The case reaches this court under writ of error to the Supreme Court of the State of Minnesota after final judgment by said last-mentioned court in favor of the plaintiff

below. As the status of the case in this court is regarded as somewhat anomalous, a comparatively full statement thereof, on behalf of the defendants in error, may not be inappropriate.

The case twice reached the Supreme Court of the State, and was twice therein decided. The original transcript certified to this court responsive to the writ of error embraces both transcripts taken to the Supreme Court of the State from the trial court, being designated, respectively, "Paper Book, October Term, 1896," and "Paper Book, October Term, 1897." The last above mentioned "paper book" only (that of 1897) appears in the printed transcript, the one of 1896 being omitted under the operation of rule 10.

In the following statement, a few references are made to the unprinted transcript of 1896, by the pages or folios of the original transcript on file in this court, for the purposes merely of an orderly history of the proceedings by consecutive dates.

April 3, 1895, the Bishop Iron Company, defendant in error, filed in the District Court for the Eleventh Judicial District of the State, its complaint against Thomas W. Hyde, plaintiff in error. This complaint, in legal substance, is a declaration in ejectment, averring in the usual form: (*a*) the corporate capacity of the plaintiff; (*b*) that plaintiff is the owner in fee of an undivided thirteen twenty-fifths ($\frac{13}{25}$) and the lessee from the fee owners for the term of thirty years of the remaining twelve twenty-fifths ($\frac{12}{25}$) of the demanded premises, and that under such ownership and lease plaintiff is entitled to immediate, sole and exclusive possession; (*c*) that defendant wrongfully entered into and took possession of said premises, and still so holds and possesses the same; (*d*) that plaintiff has demanded possession of defendant, which has been refused.

Judgment is therefore demanded for possession of the premises and for costs. (Transcript, pp. 10, 11.)

April 27, 1895, Thomas W. Hyde, sued as above, filed his answer, denominated in the paper itself an "answer and cross-petition." (Original Transcript, pp. 87 *et seq.*; Index to Printed Transcript, p. II.)

May 4, 1895, the defendant, Hyde, filed, with an accompanying affidavit, a motion for an order requiring certain persons, alleged to be necessary parties, to appear and answer "the cross-petition or counter claim" of said defendant. (Original Transcript, pp. 112 *et seq.*; Index, Printed Transcript, p. II; Printed Transcript, p. 11.)

June 17, 1895, the court passed an order bringing in all of the additional parties named. (Original Transcript, p. 115; Index, Printed Transcript, p. II.)

Certain of the persons, so made additional parties, appeared and moved to set aside the said order as improvidently issued; this motion prevailed; the defendant, Hyde, appealed from this order of the trial court to the Supreme Court of the State, which last-mentioned court, in its opinion when the case was brought before it on the first transcript, that of 1896, affirmed this order of the District Court. (Transcript, pp. 43, 48.)

These particular persons do not, at any subsequent stage of the proceedings, seem to have been treated as parties to the cause.

The motion of May 4, 1895, above mentioned, to bring in additional parties, omitting, however, the accompanying affidavit and the names of those in respect to whom the order was vacated, appears in the printed transcript. The additional parties named are Fred F. Huntress, Samuel C. Brown, Frank R. Webber, William C. Sherwood, Joseph H. Sharp, Christian Kortgard, Henry A. Smith, Herbert W. Coffin, A. L. Warner, John P. Johnson, N. J. Miller, and Frank W. Forman. (Transcript, p. 11.)

The order of June 17, 1895, above mentioned, bringing in said parties, changed so as to omit the names of those in respect to whom the original order was vacated, is found in the printed record. (Transcript, p. 12.)

July 1, 1895, Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, and N. J. Miller, six of the additional parties brought into the case by the order of June 17, 1895, filed a joint and several demurrer to the counter claim of the defendant for the reasons: (*a*) that it did not allege any cause of counter claim against the plaintiff, or any cause of action against the defendants to such cross-petition; (*b*) that upon its face it showed that Hyde had no right or title to, or interest in, the premises. (Original Transcript, p. 172; Printed Transcript, pp. 32, 33.)

July 10, 1895, Frank R. Webber, another of the persons made defendants to the cross-petition, filed general demurrer to the entire answer of the defendant. (Transcript, p. 34.)

December 7, 1895, the defendant, Hyde, under leave of court first obtained (Original Transcript, pp. 123 to 128, 171; Index to Printed Transcript, p. II), filed an amended answer and cross-petition (Transcript, pp. 13 to 32). This defence is comprised of two separate and distinct subdivisions, both as to substance and form, distinguished from each other by numerical designation, viz:

I. A specific denial or traverse of all the allegations of the complaint except demand of possession and refusal thereof, which are admitted.

II. An equitable defence, or counter-claim, stated, in introduction, to be averred against the plaintiff, the various persons above named as additional parties, and Frank B. Forman, not theretofore mentioned in the case. In this equitable defense, or counter-claim, the defendant, at great length, and with considerable particularity, sets up what is averred to be an equitable title founded upon an alleged

pre-emption claim to the premises initiated, as averred, in 1884. For present purposes it is sufficient to state that the defendant, in this subdivision, avers that he is a qualified pre emptor; that as such he settled upon these premises, with other lands, in 1884; that his right thereto was contested by other claimants; that several hearings were had before the officials of the Land Department, to which proceedings defendant was a party, and that the final result of these proceedings was one or more decisions of the Secretary of the Interior denying the validity of defendant's claim, and, as to these particular premises, the issue of a patent under which the plaintiff claims title. It is averred in this subdivision that these decisions of the Secretary were erroneous, and that defendant, under the averments of the counter-claim, is the equitable owner of the premises.

December 7, 1895, the plaintiff filed demurrer to that part of the answer and cross-petition setting up the equitable defence. The date given in the transcript as that of the filing of this demurrer, December 17, 1895, (Transcript, p. 32) is obviously a clerical error, as the order of the court disposing of the same was December 10, 1895 (see post.) and, as shown by the original transcript (page 172), it was served on opposite counsel December 7, 1895. This demurrer was in the following words (Transcript, p. 32):

"Plaintiff demurs to that part of the amended answer and cross-petition of the defendant set forth in subdivision 2 of said amended answer and cross-petition containing new matter pleaded as a counter-claim, on the ground that the facts therein stated do not, upon their face, constitute a defense."

At some date not shown by the transcript, but apparently subsequent to the filing of the amended answer, Frank W. Forman, another of the persons made defendants to the cross-petition, and Frank B. Forman, mentioned

in said amended cross-petition, filed their separate demurrer to said cross-petition upon the grounds: (*a*) that the court had no jurisdiction of the subject of the action; (*b*) that the cross-petition did not state facts sufficient to constitute a cause of action. (Transcript, p. 33.)

December 10, 1895, the District Court, upon hearing thereof, sustained the demurrer of the plaintiff to the cross-petition or counter-claim, and also the demurrer of Huntress, Brown, Smith, Sharp, Miller, and Johnson, treating, considering, and denominating the latter as a demurrer to the amended answer and counter-claim. (Transcript, p. 33.)

No action by the court appears from the record to have been taken at this time upon the demurrers of Frank R. Webber and Frank W. Forman and Frank B. Forman, above noted.

February 4, 1896, the defendant, Hyde, filed appeal to the Supreme Court of the State, from the order last above recited, and also from the order hereinbefore mentioned vacating the order making certain parties defendants to the cross-petition. (Original Transcript, pp. 175 *et seq.*; Index to Printed Transcript, p. III.)

July 24, 1896, the Supreme Court of the State, upon consideration of this appeal, in an elaborate opinion, affirmed the order of the District Court sustaining the above demurrers, and in view of this action, also affirmed, without discussion of the merits, the other order covered by the appeal. (Transcript, pp. 42 to 48.)

September 19, 1896, the case having meanwhile been remanded to the District Court, under the opinion of the Supreme Court of the State above noted, the District Court passed an order sustaining the demurrers hereinbefore mentioned, filed by Frank R. Webber, Frank W. Forman, and Frank B. Forman. This order recites and treats said demurrers as having been filed to the "amended answer and counter-claim." (Transcript, p. 34.)

October 3, 1896, the plaintiff, the Bishop Iron Company, the case, as above stated, having been remanded under the opinion of the Supreme Court sustaining the company's demurrer to the counter-claim of the defendant (Transcript, Case or Bill of Exceptions, p. 36), filed a replication to the residue of the answer, to wit, to subdivision I, being the traverse to the formal declaration in ejectment. This replication is in the following words (Transcript, p. 34):

"The plaintiff, for reply to the amended answer of Thomas W. Hyde, denies each and every allegation in the first subdivision of said amended answer, constituting the first four folios of said answer, except such facts as are alleged in plaintiff's complaint. Wherefore plaintiff demands judgment as in its complaint."

December 4, 1896, the cause, as thus put at issue by the above-noted answer and replication, having been tried before a judge of the District Court without a jury, the court filed its findings of fact and conclusions of law in favor of the plaintiff and directed judgment accordingly. (Transcript, pp. 35, 36.)

December 17, 1896, defendant filed a motion to vacate said findings, decision, and order, and for a new trial upon the grounds (Transcript, pp. 37, 38):

(1) Because not justified by the evidence.
(2) Because contrary to law.
(3) Errors of law occurring at trial.
(4) The order sustaining demurrer to counter-claim.

December 19, 1896, the court denied the foregoing motion. (Transcript, p. 38.)

December 19, 1896, the motion for new trial having been denied, the court settled a case or bill of exceptions, which is in substance as follows (Transcript, pp. 36, 37):

(1) The case was tried before one of the judges of the District Court, November 30, 1896, a jury having been waived.

(2) The mandate of the Supreme Court of the State affirming the action of the District Court sustaining the demurrer to defendant's amended counter-claim appeared on file in the District Court.

(3) Thereupon the plaintiff offered in evidence a patent of the United States to James H. Warren, dated December 26, 1894, covering the premises in suit, to which offer defendant objected as incompetent, immaterial, and irrelevant, and also upon the ground that said patent was issued without authority and void for the reasons set up in defendant's counter-claim. This objection was overruled and defendant duly excepted.

(4) The plaintiff thereupon offered in evidence deeds of conveyance from Warren and wife and mesne conveyances and instruments which, upon their face, conveyed and vested the title which Warren received under said patent, in the plaintiff, as alleged in the complaint. To these offers defendant objected as incompetent, immaterial, and irrelevant; such objections were overruled and defendant excepted.

March 13, 1897, the District Court filed amended findings of fact. These amended findings are substantially the same as the originals filed December 4, 1896 (*supra*), the facts, however, being more carefully and particularly stated.

As amended, the findings are substantially as follows (Transcript, pp. 38, 39):

(1) That plaintiff is a corporation.

(2) That plaintiff, prior to suit, acquired legal title to thirteen twenty-fifths ($\frac{13}{25}$) of said premises, and is now seized thereof by mesne conveyances from the patentee of the United States; and had also acquired, from the persons holding the legal title under said patent, a lease for the remaining twelve twenty-fifths ($\frac{12}{25}$) of said land for thirty years from March 4, 1889, with right to immediate

possession, and that the defendant, Hyde, has no title to or interest in said premises.

(3) That the defendant Hyde was and is in wrongful and unlawful possession, without color of title thereto or interest therein, and that possession was demanded by plaintiff and refused.

(4) That the persons who conveyed and leased to plaintiff, as above, acquired said lands by conveyances executed by person or persons to whom the premises were patented by the United States.

(5) That the defendant Hyde does not own, hold, or claim to own or hold, under any patent; or under any other instrument of conveyance executed by any one claiming by, through, or under any person having legal title.

As conclusions of law, upon the above facts, the court held (Transcript, p. 39):

(1) That plaintiff is owner in fee of an undivided thirteen twenty-fifths ($\frac{13}{25}$) of the land and lessee of the residue from the owners thereof.

(2) That defendant is in wrongful possession of and has no title to or interest in the premises.

(3) That plaintiff is entitled to immediate possession.

(4) That plaintiff is entitled to judgment.

March 17, 1897, in pursuance of the foregoing proceedings, judgment was entered in favor of the plaintiff, the Bishop Iron Company, for possession and costs. (Transcript, pp. 39, 40.)

March 17, 1897, the defendant Hyde and Frank W. Forman and Frank B. Forman entered into a stipulation that notice of entry of judgment was waived and that the clerk might enter said judgment, subject to all objections except such notice. (Transcript, p 40.)

March 19, 1897, judgment against Hyde, in favor of all the parties who, at any time, as hereinbefore recited, had filed demurrers to defendant's cross-bill, was entered. This

judgment recites that the action had been brought on to be heard upon the demurrer of the parties, naming them; that the court had heard counsel thereon, duly considered the same and filed its order sustaining said demurrer; that no appeal had been taken from said order and that the time for such appeal had expired. Thereupon, upon motion of counsel and under the stipulation (*supra*) filed on behalf of Hyde, the judgment orders and decrees:

(1) That Hyde has no right, title, estate, interest, or property in or to any lands described in the complaint, as against said demurring parties, naming them.

(2) That Hyde is barred and estopped from having or claiming any right, title, interest, estate or property in or to any part of said lands adverse to said demurring parties.

September 10, 1897, the defendant Hyde filed appeal to the Supreme Court of the State from both of the judgments above noted. (Transcript, pp. 41, 42.)

No assignment of errors upon this appeal to the Supreme Court of the State appears in the transcript now before this court.

April 22, 1898, the Supreme Court of the State filed its opinion, affirming the judgment of the District Court. This opinion is very brief, and holds (Transcript, p. 49):

(1) That every question presented by the first ten assignments of error was covered by the former decision.

(2) That by the eleventh assignment it was claimed that the judgment entered by the clerk in favor of the demurring parties, other than plaintiff, was not the proper one under the order sustaining the demurrers; deciding which the court held that the error complained of was not that of the court but of the clerk; that the remedy was not by appeal but by application to the lower court to correct the judgment, and, unless such remedy was followed, the question could not be reviewed on appeal.

April 18, 1898, the appeal was heard and submitted to the court upon paper book and briefs of counsel. (Transcript, pp. 53.)

May 3, 1898, order was entered affirming, in all things, the judgment below, and directing judgment accordingly. (Transcript, p. 52.)

May 3, 1898, judgments of the Supreme Court, affirming, respectively, both of the judgments below, were entered. (Transcript, pp. 50, 51, 52.)

July 28, 1898, upon application by defendant below to the Chief Justice of the Supreme Court of the State, which was allowed, writ of error to that court issued in the usual form. (Transcript, pp. 1, 2, 3.)

July 28, 1898, in connection with his application for writ of error, and subsequently, October 1, 1898, under section 9, rule 10, of this court, plaintiff in error filed his assignment of errors relied upon in this court. (Transcript, pp. 4 to 7; 55 to 59.)

From the foregoing detailed statement of the proceedings in the case, it appears:

First. As to the Bishop Iron Company. That the company filed a declaration in ejectment; that Hyde answered, denying in part and confessing as to part, coupling this with a separate, independent, equitable defence pleaded by way of cross-petition; that to this cross-petition, as amended, the Bishop Iron Company demurred; that the trial court sustained this demurrer and Hyde appealed; that upon this appeal, the Supreme Court of the State affirmed the order below and remanded the case to the trial court; that thereupon the Bishop Iron Company filed replication to so much only of the answer of Hyde as was not previously demurred to; that thereupon the cause proceeded to trial upon this issue before the court without a jury; that upon this trial the plaintiff, under objection and exception, introduced certain evidence and the defendant offered none; that the court thereupon filed its findings of fact and conclusions of law in favor of the

Bishop Iron Company, overruled a motion for new trial, settled a case or bill of exceptions and ordered and entered judgment; that from this judgment Hyde appealed to the Supreme Court of the State; that upon this appeal, the last-mentioned court affirmed the judgment below, and that thereupon Hyde sued out his writ of error, bringing the case to this court.

Second. As to the other nine defendants in error. These persons were made parties defendant to the cross-petition and demurred thereto. Six of them—Huntress, Brown, Smith, Sharp, Miller, and Johnson—demurred July 1, 1895, prior to the order of the District Court sustaining the demurrer of the Bishop Iron Company, December 10, 1895. (Transcript, pp. 32, 33.)

Third. One other of said parties, Frank R. Webber, demurred prior to said order December 10, 1895 (Transcript, p. 34), but does not seem to have been mentioned in the subsequent proceedings, except in the opinion of the court, where his name appears in the caption. (Transcript, p. 42.)

Fourth. Two other of said parties, Frank W. Forman and Frank B. Forman, filed demurrer, at a date not shown by the record (Transcript, p. 33), but undoubtedly subsequent to the filing of the amended cross-petition.

Fifth. After the trial of the issue between the Bishop Iron Company and Hyde, and judgment thereon, March 17, 1897 (Transcript, pp. 39, 40), the court entered another judgment, March 19, 1897 (Transcript, pp. 40, 41), against Hyde and in favor of all the demurring defendants in error except the Bishop Iron Company. This judgment recited that these parties had demurred; that the court had heard and considered said demurrers and filed its order sustaining the same; that no appeal from said order had been taken, and that the time for filing appeal therefrom had expired; and, thereupon, adjudged in favor of these defendants in error, first, that Hyde had no title; second, that he was bound and estopped from having or claiming any such title. This judgment, so far as these parties are concerned, is the one appealed to the Supreme Court of the State, by that court affirmed, and now here under the writ of error.

The assignment of errors filed in this court apparently assumes that the writ of error brings to this court for review the action of the State courts upon the equitable defense set up in the cross-petition, and, as supplemental to this position, further assumes:

First. That the allegations of such cross-petition are to be here taken as admitted by all the defendants in error; as to the Bishop Iron Company, by its replication to subdivision I of the answer, and as to the other defendants, by their demurrers respectively.

Second. That the opinion of the State court, when the case was first before that tribunal upon demurrer, and before the trial in which the judgment here appealed from was made, is a finding of facts in respect to which assignments of error can be made upon the ground that such finding does not, as claimed, correctly state particular facts as pleaded in the cross-petition.

Then proceeding, plaintiff in error assigns in two subdivisions, I and II, various supposed errors. As consolidated and relied upon in the brief of counsel in this court, they in substance are:

I. That the court erred in deciding that the plaintiff in error was not the equitable owner of the land in question.

II. Ten specific assignments, each alleging some particular error in the opinion of the Supreme Court of the State when the case was first before it on demurrer, the claim, in each instance, being of some error by the court in passing, in this opinion, upon the allegations of the cross-petition.

BRIEF.

On behalf of the defendants in error, we submit the following propositions:

I. Assuming that the writ of error brings to this court

for review the ruling of the court below sustaining the demurrers to the cross-petition or equitable defense, we then submit that this ruling was without error and that the judgment below must, therefore, be affirmed.

II. As no error is assigned, or appears, in respect to the findings of the trial court, the settled case or bill of exceptions, or other matter appearing of record, except such as is predicated upon the validity and efficacy of the equitable defense as pleaded, it follows that if such equitable defense was bad on demurrer, there is here no further question for review.

III. As to all the defendants in error except the Bishop Iron Company, the judgment of the Supreme Court of the State, affirming in all things the judgment of the District Court of March 19, 1897, must be affirmed, because, upon the facts found in said last-mentioned judgment of the trial court, the plaintiff in error had taken no appeal from a previous order sustaining the demurrers and the time for such appeal had then expired.

IV. The writ of error does not bring into this court any question involved in the equitable defense pleaded by plaintiff in error in his cross-petition. All such questions are concluded by the orders and judgments of the court below. And as no error is assigned independently of such equitable defense, and none other appears, the judgment below must be affirmed.

I.

The Demurrers Were Properly Sustained.

Assuming for the purposes only of the point here under discussion, that the ruling of the court below, sustaining the demurrers, is properly before this court, we proceed to

the inquiry whether the cross-petition states a good cause of action or equitable defense.

The legal title of the defendants in error rests upon a patent of the United States, dated December 26, 1894 (Tr., pp. 24, 36), which, by relation, took effect as of the date of the location or entry upon which it was founded, October 15, 1885. (Tr., p. 15.) This title has been sustained by the Circuit Court and the Circuit Court of Appeals (Hartmann *v.* Warren, 76 Fed. Reporter, p. 157) in litigation which has now become final, and it is here admitted that the plaintiff below was entitled to recover unless the plaintiff in error has shown himself to be the equitable owner. (Brief of Counsel, p. 7.)

The facts averred as an equitable defense relate to and arise out of four separate proceedings in the land department, to all of which the plaintiff in error was a party. In these proceedings occurred several decisions of the Commissioner of the General Land Office and Secretary of the Interior. The cross-petition recites the rendition of several of these decisions, but in only two instances gives a copy thereof as an exhibit; and in one instance, at least, a very important decision of the Secretary of the Interior is not even mentioned. Assuming that the court will take judicial notice of these decisions of the land department, in conformity to established authority as we shall hereafter show, the facts averred as an equitable defense, arranged with reference to the several proceedings, respectively, and in chronological order, are substantially as follows:

(a) *Hyde's contest against Sioux Half-Breed locations.*

(1) That, June 16, 1883, the particular governmental section of land in which the premises in controversy are situated being still unsurveyed, one Frank W. Eaton,

ostensibly as attorney in fact for one Orille Moreau, located a certain portion thereof by metes and bounds with two certain pieces of Sioux Half-Breed scrip, Nos. 19 D. and 19 E. This location, upon subsequent survey of the land and filing of plat thereof, about July 20, 1885 (Tr., p. 14), was adjusted, in the name of Orille Stram, née Moreau, so as to embrace technical tracts, according to the governmental subdivisions, as follows: No. 19 D., for lots 3, 5, and 6, and S.E. ¼ N.W. ¼ of Section 30, Tp. 63 N., R. 11 W.; No. 19 E., for lots 1 and 2, S.W. ¼ N.E. ¼, and N.W. ¼ S.E. ¼ of said section. (Tr., p. 16.) The act of Congress under which this scrip was issued, as the court will judicially notice, is that of July 17, 1854 (10 Stat. 304), which declares that no transfer or conveyance of any certificate or scrip issued under its provisions shall be valid, and that the same shall, when applied to unsurveyed lands, be located only on tracts "upon which they (the mixed-bloods) have respectively made improvements."

(2) That, August 20, 1884, Hyde, being a qualified pre-emptor, made settlement upon the premises involved in the case at bar, being then vacant and unoccupied, with intent to acquire title thereto under the pre-emption law. This tract, upon the subsequent survey hereinbefore mentioned, became the N.E. ¼ S.W. ¼ of the section. Immediately after such settlement, the defendant erected a house upon the tract, cleared and cultivated part of the land and has ever since resided upon and held possession of the same. (Tr., pp. 13, 14.) This particular forty-acre tract adjoins upon its north line one of the forties located by Eaton, in 1883, with Sioux Half Breed scrip, No. 19 D., as hereinbefore mentioned.

(3) That, October 9, 1884, Hyde filed in the local land office a duly corroborated affidavit of contest against the Sioux Half-Breed Scrip location, No. 19 D. upon the ground

that no improvements had ever been made upon the land by the scripee, either in person or by agent, and in support of such charge filed an affidavit of said scripee denying that she had ever given any power of attorney to Eaton; and that, in refutation of said charge, the said Eaton filed in said office certain affidavits and other papers. (Tr., pp. 16, 17.)

(4) That, October 9, 1884, one Angus McDonald filed a like contest against the Sioux Half-Breed Scrip location No. 19 E., and that Eaton in like manner replied. (Tr., p. 17.) These two applications to contest were transmitted by the local officers to the General Land Office, October 31, 1884. (Tr., Ex. A, p. 25.)

(5) That, July 20, 1885, after the filing of the township plat, Hyde made application at the Duluth Land Office to file a pre-emption declaratory statement, which application embraced the forty acre tract involved in the case at bar, not covered by either of the Sioux Half-Breed locations, viz., the N.E. ¼ S.W. ¼, and also three of the forty-acre tracts covered by Scrip No. 19 D., against which he had, as aforesaid, brought contest, viz., lots 5 and 6 and S.E. ¼ N.W. ¼ of the section, the whole forming a compact body of one hundred and sixty acres of contiguous or connected forty-acre tracts; that upon tender of his pre-emption declaratory statement, as aforesaid, the local officers informed him that they would reject the same, unless limited to the tract not covered by the Sioux Half-Breed location; that he thereupon informed said officers that his house and cultivation were upon said last-mentioned tract, and that he intended to claim the same, whether successful or not, in his contest for the other three forties; that the land officers retained his application and informed him that if he was a *bona-fide* settler, he had done all that was necessary to protect his rights; that subsequently, on the same day, the

register of said land office endorsed upon said application a formal rejection thereof as to the three forties covered by the scrip location, allowing thirty days for appeal; and that thereafter, August 20, 1885, the local officers having retained possession of the paper, endorsed thereon, "Filed August 20, 1885." (Tr., pp. 14, 15.)

(6) That within thirty days after July 20, 1885, the date of the rejection of his application as aforesaid, but without knowledge of the endorsement that day placed thereon, relying upon what had been said to him by the local officers and supposing his application had been entirely rejected, he filed an appeal to the Commissioner of the General Land Office, which was transmitted to Washington by the local officers August 20, 1885. (Tr., p. 15.)

(7) That, November 14, 1885, the Commissioner of the General Land Office, acting upon the applications of Hyde and McDonald to contest the two Half-Breed Scrip locations, Nos. 19 D and 19 E, ordered a hearing between the parties. (Tr., p. 17.) Copy of this order of the Commissioner accompanies the cross-petition as "Exhibit A." (Tr., pp. 25, 26.) It recites the Sioux Half-Breed Scrip locations; that the local officers had transmitted the applications of McDonald and Hyde to contest the same upon the grounds hereinbefore stated, and that Eaton had also submitted various enumerated papers in reply. The Commissioner thereupon orders a hearing "that the respective parties may have an opportunity to submit such proof as they may have in support of their allegations and that this office may be possessed of all the facts possible in the matter." (Tr., p. 26.)

(8) That, November 17, 1885, the local officers, acting under direction of the Commissioner, ordered a hearing and fixed the date of the same for April 6, 1886. (Tr., p. 17.) Separate notices of this hearing were given McDonald and

Hyde, copies of which accompany the cross-petition as Exhibits B and C. (Tr., pp. 26, 27.) These notices advise the parties that upon the allegations made by them against the scrip locations, the Commissioner has ordered the register and receiver to inquire into and determine the truth of the same and accordingly summons them for that purpose.

(9) That, April 6, 1886, pursuant to the notices aforesaid, the contest of the said Angus Mc Donald was heard before the local officers, all parties appearing; that on said hearing, there was admitted, erroneously and contrary to law, certain irrelevant, incompetent, and immaterial testimony, which is recited in full. (Tr., pp. 17, 18, 19.) It consists of testimony by S. F. White, Hyde, and McDonald, all showing, or tending to show, the existence of a contract in writing between Hyde and McDonald, upon one part, and White and James H. Powers, upon another part, under which, in violation of the pre-emption law, the title to be acquired to their pre-emption claims by Hyde and McDonald was to inure, in part, to White, or to White and Powers. The cross-petition avers that the testimony quoted, as above, was all the evidence taken upon said hearing relative to said contract.

(10) That at the conclusion of the said hearing in the McDonald case, all parties to the case of Hyde against the location made with No. 19 D. entered into the following stipulation of record (Tr., pp. 19, 20):

"It is hereby stipulated and agreed upon that this testimony shall be considered in determining the validity of both locations of scrip 19 D. and 19 E."

(11) That no testimony, except under the above stipulation, was taken in said Hyde contest against Scrip No. 19 D.; that the testimony under the said stipulation

was only for the purpose of determining the validity of the scrip location, and that the validity of such location was the only issue in the case. (Tr., p. 20.)

(12) That upon the testimony taken in said cases, the local officers decided that both said scrip locations were valid, and thereupon the said Hyde and McDonald appealed to the Commissioner of the General Land Office. (Tr., p. 20.)

(13) That, August 4, 1888, the appeals taken by Hyde and McDonald from the decision of the local officers, in their contests against the Sioux Half-Breed locations, came on to be heard before the Commissioner of the General Land Office; that the Commissioner, by decision of that date, canceled said scrip locations on the ground that the evidence showed no improvements upon the land by the scripee, and that from this decision Eaton appealed to the Secretary of the Interior. (Tr., p. 20.) The cross-petition also avers that this decision rejected the application of Hyde, so far as the same related to the tracts covered by the Sioux Half-Breed location, but this averment is not supported by anything found in the decision itself, which is made Exhibit D of the petition. (Tr., pp. 28 to 32.)

(14) That, February 18, 1889, the then Secretary of the Interior (Hon. Wm. F. Vilas) having before him the appeal by Eaton from the decision of the Commissioner of August 4, 1888, and the appeals by Hyde and McDonald from the decision of the Register and Receiver, in the contest of said Hyde and McDonald against the Sioux Half-Breed scrip locations, affirmed the said decision of the Commissioner; that the appeal by Hyde from the decision rejecting his application to file as a pre-emptor had, so far as the lands involved in that proceeding were concerned, been disposed of by the Commissioner's decision and was not before the Secretary; that McDonald had exhausted his right

and that that fact was called to the attention of the Secretary; that, notwithstanding the premises, the Secretary, erroneously and contrary to law, determined that the claims of said Hyde and McDonald were before him in said proceeding; that so adjudging, the Secretary, erroneously and contrary to law, further decided that the testimony before him showed that it was impossible for Hyde to make the affidavit required by Section 2262 of the Revised Statutes of the United States to the effect that he had not "directly or indirectly, under any agreement or contract, in any way or manner, with any person whatever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself," and that consequently his pre-emption claim should be rejected and the land declared open to disposition to the first legal applicant. The cross-petition, in this connection, further avers that this decision of the Secretary was in consequence of mistake in misapprehending and misquoting the testimony of Hyde to the effect that when he proved up he was to secure White "a half interest," instead of "on a half interest." (Tr., pp. 20, 21.) As hereinbefore noted, the Commissioner's decision of August 4, 1888, made part of the cross-petition, does not dispose of the pre-emption claim of Hyde, and is, therefore, directly repugnant to the averment in that regard above recited. No copy of the decision of Secretary Vilas above referred to accompanies the cross-petition, and it does not appear in the published decisions of the Department. An exemplified copy, however, has been filed in this court by defendants in error, and is printed as "Appendix No. 1" to this brief.

From the exemplified copy of this decision of Secretary Vilas it appears:

(*aa*) That in Hyde's application to contest the Sioux Half-Breed location, in addition to alleging illegality in such location, he affirmatively asserted his own claim thereto as a pre-emptor; that he was a single man over twenty-one years of age, and had declared his intention to become a citizen; that he did not own 320 acres of land in any State or Territory; that he had not left land of his own in said State to settle on public lands; that he had never theretofore exercised the pre-emption right; that he had settled upon this land on the 20th day of August, 1884, for his own use and benefit, and that he intended to file his declaratory statement therefor as soon as the plat of survey was filed.

(*bb*) That the application prayed the allowance of a contest in consideration of the above allegations.

(*cc*) That at the hearing of the contest before the Register and Receiver, as appeared from the record, all parties to the case assumed that the rights of Hyde and McDonald were involved, and that voluminous testimony was taken on that question.

(*dd*) That the Register and Receiver, in their decision, so treated the case, but in view of their finding in favor of the scrip locations, did not consider it necessary to pass upon the question of the *bona fide* character of the pre-emption claims.

(*ee*) That the Commissioner, upon this appeal, reversed the decision of the Register and Receiver, without allusion to the matter of the pre-emption claims.

(*ff*) That the appeal of Hyde from the decision of the Register and Receiver, rejecting his application, was transmitted to the Secretary, with the appeal by Eaton, and was before him with the record.

(*gg*) That before the Secretary, upon appeal, the question whether the pre-emption claim of Hyde was then pending on the record before him, was directly raised in argument and fully considered.

(*hh*) That the Secretary, after full consideration, held that the pre-emption claim of Hyde was directly put in issue and tried; that, under the circumstances of the case, it was the duty of the Department to dispose of it; that

under the testimony Hyde had undoubtedly made a contract which would prevent his perfecting his claim; that the same should therefore be rejected, and, all other claims being also rejected, that such his decision left "the land in question open to disposal under the land laws of the United States applicable thereto."

(15) That Hyde filed a motion for review of the above-recited decision of Secretary Vilas, basing said motion upon the grounds that a mistake had been made in misquoting the testimony of Hyde, that his pre-emption claim was not in issue, and that the land should not have been held open to the first applicant, and that such motion was, upon the 28th day of January, 1891, overruled in all things by the then Secretary, Hon. John W. Noble, except that the said decision was modified so that the preference right of entry claimed by Hyde and McDonald was not decided thereby. (Tr., pp. 22, 23.) This decision is not shown by exhibit, but is found in 12 Land Decisions, page 157, *et seq.*, and the material portion thereof is printed as "Appendix No. 2" to this brief. By reference thereto it will be seen:

(*aa*) That Secretary Noble carefully reconsidered the entire decision of his predecessor and reaffirmed the same in all things except to modify it so as to exclude the presumption that it denied, in advance of presentation, any claim which Hyde might present to a preference right of entry under the act of May 14, 1880 (21 Stat., 140, Sec. 2).

(*bb*) That the Secretary specifically held, affirming his predecessor, that the record brought up the pre-emption claim of Hyde for review and that the Department had full jurisdiction to decide it.

(*cc*) That the Secretary held that the misquotation of the testimony of Hyde was entirely immaterial; that the change did not destroy the effect of the testimony as a whole or require a different conclusion; that there was testimony to sustain the finding of his predecessor; that it was not shown

that such finding was against the preponderance of the evidence and that review would not, therefore, be allowed.

(*dd*) That upon this motion there were filed *ex-parte* affidavits of Hyde, McDonald and White, upon the question of the contract; that the Secretary gave such affidavits consideration and held that they did not destroy the force of the previous testimony, or call for any further action on the claims; that their use was apparently an effort to take the particular tract in controversy in the case at bar "out of the contract mentioned and clear it of the taint attaching to the claim," and that this was impossible because a contract to convey any part rendered the whole claim invalid.

(*ee*) That the Secretary held that any question as to Hyde's preference right of entry, under the act of 1880, could only arise after cancellation of the scrip location and notice thereof and ought not to be decided prior to that time; that such question was not expressly decided by Secretary Vilas, but, to prevent such an inference, his decision would be modified by saying that the question was not decided.

(b) *Contest after restoration of lands to public appropriation.*

December 21, 1894, the then Secretary of the Interior, Hon. Hoke Smith, rendered a decision in another proceeding, entitled McDonald *et al. v.* Hartmann *et al.*, to which Hyde was a party, involving all of the tracts formerly covered by the Sioux Half-Breed locations. This proceeding and decision, which are not referred to in any way in the cross-petition, were the natural sequence of the Hyde and McDonald contest against the Sioux Half-Breed scrip. From Secretary Smith's decision, found in 19 L. D., page 547 *et seq.*, and the material portion of which is printed as "Appendix No. 4" of this brief, the following appears:

(*aa*) That pursuant to the decision of Secretary Vilas of February 18, 1889, cancelling the Sioux Half-Breed loca-

tions, the lands covered thereby were, upon the 23d day of February, 1889, opened to receipt of applications and filings at the District Land Office; that immediately upon the opening of the said office on the morning of that day, various conflicting applications to enter, locate and file were tendered by various parties; that these conflicts resulted in a hearing being ordered to determine the claims of the respective applicants; that at this hearing a vast amount of testimony was taken and that this decision of December 21, 1894, was the judgment of the Secretary of the Interior upon said case.

(*bb*) That under and in pursuance of the decision of Secretary Noble, dated January 28, 1891, hereinbefore noted, reserving for future disposition the claimed preference right of Hyde, the latter became and was a party to this succeeding case now under notice; that he was recognized as such by the order for a hearing; that he became formally a party, under a distinctive claim, by filing, upon the 2d day of April, 1891, a homestead application, alleging settlement August 20, 1884; that he appeared at the trial and produced a large amount of testimony relating to his settlement, residence, and cultivation; that he appealed from the adverse decision of the Register and Receiver; that he also appealed from the decision of the Commissioner affirming that of the local officers, and that while the case was before the Secretary he was represented by counsel, who elaborately presented his case.

(*cc*) That the Secretary in disposing of the case treats the claim of Hyde as arising in two ways: first, under his pre-emption claim; second, as a preferred claimant under the act of May 14, 1880, by virtue of his contest against the Sioux Half-Breed location. He disposes of the pre-emption claim, in terse and forcible language, by holding that all questions relating thereto are *res adjudicata* under the decisions of his predecessors; and as to the claim of preference right under the act of 1880, he rejects the same, holding that the proceedings in the prior contest were not, either by intendment or in form, a contest under said act; that there was no intimation even in such proceedings that the contest was so intended; that the papers bear no resemblance

whatever to the familiar affidavits used under that act; that during the progress of the original contest proceedings, Hyde, by his attorneys, declared that such was not the character of the contest and refused to pay the land-office fees required of contestants by the act; that this claim was evidently an afterthought which came to Hyde when casting about for some means to extricate himself from the wreck in which the decision of February 18, 1889, involved him, and that there was no theory of the case under which he could be called a contestant under said act.

April 12, 1895, the foregoing recited decision by Secretary Smith was, upon motion for review, reaffirmed by the same officer. This action is noted in 20 Land Decisions, page 324.

The decision of the Commissioner of the General Land Office, in the case, which was affirmed in all things so far as the above-enumerated points are concerned, is shown by exemplified copy filed by defendants in error, and the material portion thereof is printed as "Appendix No. 3" to this brief. From this decision the following additional facts appear:

(*dd*) That upon the trial of the case before the local officers "voluminous testimony" was introduced on the question of the existence of the prohibited contract.

(*ee*) That in his decision the Commissioner found that this testimony clearly and conclusively established the fact of the existence of such a contract, even if such fact did not conclusively appear in the prior case.

(*c*) *Hyde's application to contest Warren location.*

(1) That, October 15, 1885 (two months after Hyde's rejected application to file pre-emption declaratory statement and his appeal from such decision had been transmitted to the General Land Office and while the record at

the local office was clear), Joseph H. Sharp, as attorney in fact for James H. Warren, a beneficiary under the 7th clause of the 2d section of the Treaty of September 30, 1854 (10 Stat. 1109), located, in the name of said Warren, the particular forty-acre tract here in controversy, with a certificate of identity issued to him under said treaty. The cross petition avers that the said certificate was issued without authority and unlawfully, and, upon information and belief, that Sharp was not the attorney in fact for Warren, but an agent of parties to whom Warren had sold the same and who had knowledge of defendant's rights at the time of such location. (Tr., pp. 15, 16.)

(2) That, April 10, 1886 (four days after the trial of the Sioux Half-Breed contest at the local office, as hereinbefore recited), Hyde filed in the local land office an application to contest the above-mentioned location, upon the ground of his (Hyde's) prior pre-emption claim, and accompanied said application with a motion to cancel the said Warren location. (Tr., p. 16.) What immediately became of this application is not averred, but presumptively it was forwarded to the General Land Office in due course of business.

(3) That, December 22, 1888, the Commissioner of the General Land Office, upon this application, ordered a hearing before the local land officers to determine the superior right between Hyde and Warren. No copy of this order is filed with the cross-petition. (Tr., p. 16.)

(4) That, March 8, 1889, eighteen days after Secretary Vilas' decision declaring Hyde's claim invalid, and in pursuance thereof, but without notice to Hyde, the Commissioner revoked the order of December 22, 1888 (*supra*), directing a hearing upon Hyde's application to contest the Warren location. (Tr., p. 22.)

(5) That, about July 6, 1889, Hyde moved the Commis-

sioner to set aside the order of March 8, 1889, upon which motion no action has ever been taken. (Tr., p. 22.)

(d) *The Hartmann contest versus Warren.*

(1) That, March 19, 1889 (the claim of Hyde having been then rejected by Secretary Vilas' decision of February 18, 1889, and the order of the Commissioner for a hearing upon Hyde's application to contest the Warren location having been, March 8, 1889, consequently revoked), one Emil Hartmann filed an application to contest the Warren location, which was refused by the local officers, as were also certain applications by other persons to enter and contest said lands offered at about the same date. (Tr., p. 22.)

(2) That, October 16, 1889, these applications having reached the General Land Office upon appeal, the Commissioner affirmed the action of the Register and Receiver, but did not pass upon the motion of Hyde to reinstate his contest against the Warren location, and that from this decision of the Commissioner all parties to the case, including Hyde, except Warren, appealed to the Secretary of the Interior. (Tr., p. 22.)

(3) That, May 31, 1892, the Secretary of the Interior (Hon. John W. Noble), upon consideration of these appeals, rendered a decision, based upon the prior decision of Secretary Vilas of February 18, 1889, erroneously and contrary to law deciding that Hyde could claim nothing by virtue of his pre emption claim, and ordering a hearing upon Hartmann's contest. (Tr., pp. 22, 23.) No copy of this decision of Secretary Noble accompanies the cross-petition, but it will be found in 14 Land Decisions, pages 576 *et seq.*, and the material portion thereof is printed as "Appendix No. 5" to this brief.

From this decision of the Secretary it appears that the following was decided:

(*aa*) That Hyde was not a contestant under his application of April 10, 1886, the only one prior to the others then pending, because it was based upon his pre-emption claim which was declared invalid by the two preceding decisions; and also because his motion to set aside the order revoking the hearing was not filed until July 6, 1889, subsequent to the other applications to contest.

(*bb*) That, although he had made certain other recited applications or tendered filings, he had no perfected application to contest until long after those of the other parties to the case then pending, and that his rights as a contestant were subject to such prior applications.

(4) That, November 12, 1892, upon motion for review filed by Hyde, Secretary Noble reaffirmed his prior decision of May 31, 1892 (*supra*), and denied said motion. (Tr., p. 23.) No copy of this decision accompanies the cross-petition. It will be found in 15 Land Decisions, pages 415 *et seq.*, and the material portion thereof is printed as "Appendix No. 6" to this brief.

In this decision, as affecting Hyde, the Secretary holds and decides:

(*aa*) That there was no error in rejecting Hyde's pre-emption claim by reference to the preceding decisions denying its validity.

(*bb*) That Hyde's rights as a contestant were not definitely disposed of by the decision sought to be reviewed, but simply postponed until the prior contests were decided.

(5) That, under the above-mentioned decisions, a hearing upon the Hartmann contest against Warren was had; that when said case was called before the local officers, Hyde appeared and demanded to be made a party thereto and to be allowed to offer evidence in support of his *pre-emption*

claim; that these demands were refused by the local officers; that defendant appealed to the Commissioner; that said last-mentioned officer affirmed the decision below; that Hyde appealed to the Department, and that upon the hearing of this last appeal the Secretary (Hon. Hoke Smith), July 20, 1894, affirmed the decision of the Commissioner. (Tr., pp. 23, 24.) No copy of this decision accompanies the cross-petition. It is reported in 19 L. D., pages 64 *et seq.*, and the material portion thereof is printed as "Appendix No. 7" to this brief.

This decision, reaffirming the prior decision of Secretary Smith, on review, in Hyde *v.* Warren, 15 L. D., 415, and quoting therefrom, again decides that all questions under Hyde's pre-emption claim are *res adjudicata.* His claim as a contestant under the act of 1880 was not even raised by Hyde upon the hearing nor is it mentioned in the decision. As will be recollected, that claim was subsequently, December 21, 1894, by the same Secretary (Mr. Smith), fully considered and decided in the case of McDonald *et al. v.* Hartmann *et al.*, 19 L. D., 547, hereinbefore particularly recited, in which Hyde was a party and directly raised that particular point.

The foregoing statement enumerates, in substance, all the facts relied upon by plaintiff in error as constituting an equitable defense, both as pleaded and as shown by the official decisions of the Commissioner and Secretary. Our excuse and apology for reciting the same with such detail and particularity is the apparent impracticability otherwise of conveniently possessing the entire case as it exists.

Prior to the discussion of the question here immediately under consideration, certain preliminary consideration are pertinent.

First.

This court will take judicial notice of the several orders and decisions of the Secretary of the Interior and Commissioner of the General Land Office referred to in the cross-petition or made by either of those officials as part of the proceedings upon which the equitable defense is based and of all facts found by said decisions not contrary to the findings of fact in the case at bar. And in ascertaining facts of which the court will thus take judicial notice, it will be informed from such sources as it deems most reliable, including the official printed reports of such decisions or exemplified copies thereof filed with the transcript.

The general doctrine upon which the foregoing proposition rests is a familiar one and is clearly applicable to the case at bar, where it is invoked in respect to records of public officers, acting within their jurisdiction upon the same subject-matter, and where the identical papers, with one exception, are referrd to in, and thus made part of, a pleading before the court.

Judicial notice will be taken of the recognition or denial of the sovereignty of a foreign power, as the same appears by the acts of that part of the executive branch of the government dealing with foreign affairs, although such acts are not formally put in evidence, nor even in accord with the pleadings.

Jones *v.* United States, 137 U. S., 202, 214.

The same doctrine has also been applied to the general amnesty proclamation of the President of December 25, 1868.

Armstrong *v.* United States, 13 Wall., 154.

Jenkins *v.* Collard, 145 U. S., 546, 560, 561.

And also to the archives of the former Mexican government of California affecting land titles.

United States *v.* Teschmaker, 22 How., 392, 405.
Romero *v.* United States, 1 Wall., 721, 742.

And in respect to the records of the Department of the Interior, as that branch of the executive power having jurisdiction over the disposal of public lands, this court has repeatedly held that they were within the class of public records of which the court would take judicial notice.

Caha *v.* United States, 152 U. S., 211, 221, 222.
Heath *v.* Wallace, 138 U. S., 573, 583, 584.
Knight *v.* U. S. Land Assn., 142 U. S., 161, 168, 169.
Johnson *v.* Drew, 171 U. S., 93, 99.

Caha *v.* United States (152 U. S. 211, *supra*) was an indictment for perjury, reaching this court in error from the District Court of the United States for the district of Kansas. The false swearing was alleged to have occurred in a certain contest respecting a tract of public land, before the Register and Receiver of the United States Land Office at Kingfisher, Oklahoma, wherein the defendant was a party. The rules and regulations prescribed by the Interior Department in respect to contests before local land offices were relied upon to sustain the conviction, although such rules and regulations had not been introduced in evidence. The question directly arose whether, in a criminal proceeding, the court could take judicial knowledge of these records of the Interior Department, and in disposing of that question, the court, speaking by Mr. Justice Brewer, said (pages 221, 222):

"The rules and regulations prescribed by the Interior Department in respect to contests before the Land Office were not formally offered in evidence, and it is claimed

that this omission is fatal, and that a verdict should have been instructed for the defendant. But we are of opinion that there was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which the courts of the United States take judicial notice. Questions of a kindred nature have been frequently presented, and it may be laid down as a general rule, deducible from the cases, that wherever, by the express language of any act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."

Heath *v.* Wallace (138 U. S. 578, *supra*) was an action of ejectment brought to this court by writ of error to the Supreme Court of the State of California. The plaintiff below, and in error, claimed title under the swamp-land grant of September 28, 1850, as confirmed, in that State, by the special act of July 23, 1866 (14 Stat. 218, 219; R. S., sec. 2488). The defendant claimed under a patent issued upon a pre-emption claim. The special act of 1866 confirmed all lands designated upon approved township plats as "swamp and overflowed." The findings of fact showed that upon an official approved survey of the township, a certain portion thereof, embracing the particular tract in question, was colored blue and designated "land subject to periodical overflow." One of the questions presented was whether lands thus designated as "subject to periodical overflow" were within the descriptive terms of the confirmatory act as "swamp and overflowed." This court, affirming the judgment of the court below, held that lands so designated were not within the confirmation, and, in thus disposing of the case, took judicial notice of facts shown

by a decision of the Secretary of the Interior, affecting the same general body of lands but forming no part of the record in the case before the court. In this connection, Mr. Justice Lamar, in delivering the opinion of the court, referred to the decision of the Secretary mentioned, by reference to the report thereof in the Land Decisions; recited that in such decision the Secretary found that upon said plat were certain other and additional notations, showing the construction given the disputed words by the Department, and then added (page 584):

"We think we may take judicial notice of such official statements made by the head of one of the branches of the Executive Department, especially as they relate to the public records under his control. (1 Greenleaf on Ev. § 479; Jones *v.* United States, 137 U. S. 202, and authorities there cited.)"

The case of Knight *v.* The U. S. Land Association (142 U. S. 161, *supra*) was an action of ejectment brought to this court by writ of error to the Supreme Court of the State of California and involved title to tide lands at the water front of the city of San Francisco. The judgment of the Supreme Court of the State was reversed in conformity with two elaborate and exhaustive opinions, one on behalf of the entire court, by Mr. Justice Lamar, and one, additional thereto, and concurring, by Mr. Justice Field. Both of these opinions refer to and take judicial notice of many facts connected with the title of the Pueblo of San Francisco, not shown in the record but recited in various records of the Department of the Interior. And in explanation of, and as authority for, so proceeding, the statement of the case, prepared by the learned justice who delivered the opinion of the court, thus proceeds (pages 168, 169):

"To understand precisely the exact nature of the questions involved in this case, a somewhat more detailed statement of facts than is contained in the above findings of the referee will be found useful. These facts are not contradictory of those findings and are recited in former decisions of this court, statutes of the United States, and of the State of California, and the records of the Interior Department, of all of which the court can take judicial notice."

Johnson *v.* Drew (171 U. S. 92, *supra*) was an action in ejectment coming to this court in error to the Supreme Court of the State of Florida, and the main question involved was whether the premises in controversy were within the limits of a military reservation at the time a patent was issued. In disposing of the case, the court, after referring to the testimony as it appeared in the record, thereupon considered, as properly bearing on the subject, a part of the records of the General Land Office. Mr. Justice Brewer, in delivering the opinion of the court upon this point, said (p. 99):

"Further and finally, the plat on file in the General Land Office, and a part of the public records, puts the question at rest, and locates the land outside the reservation. Hence, as shown by the testimony and by the public records, this land ever since 1870 has been part of the public lands of the United States and subject to disposal in accordance with the general land laws."

The last four above recited cases are directly in point, and must, we think, be taken as conclusive of the question now under consideration. In the first, the doctrine was applied to the set of rules and regulations governing practice before the local land office, not precisely the case at bar, but fairly illustrating the principle and properly controlling the question in the case. The last three cited cases are precisely that at bar, except that in the pending case there is

the additional consideration that the records relied upon are actually made part of the pleadings by specific reference.

Upon the question of the method or the medium by which it may become possessed of the facts of which it will take judicial notice, the court has been equally explicit.

In Jones *v.* United States (137 U. S. 202, *supra*), speaking to this point, the court, by Mr. Justice Gray (p. 216), said:

"In the ascertainment of any facts of which they are bound to take judicial notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy. * * * As to international affairs, such as the recognition of a foreign government or of the diplomatic character of a person claiming to be its representative, they may inquire of the foreign office or the Department of State."

It will be observed that in the assignment of errors filed in this court, and in the brief of counsel thereon, it is claimed that the allegations of the cross-petition are "admitted to be true by the reply of the Bishop Iron Company." (Tr., p. 4.) And in brief of counsel, at page 2, it is asserted that after the record was transmitted from the Supreme Court to the trial court, after the first hearing, the Bishop Iron Company "withdrew its demurrer and interposed a reply in which it admitted all the facts set forth in the counter-claim to be true." The situation, as it seems thus to be understood by counsel, is not the real situation of the pleadings, either in fact or law. The case first went to the Supreme Court of the State upon a demurrer of the Bishop Iron Company, and a demurrer of certain of the other defendants in error, interposed solely and only to the second subdivision of the defendant's answer, which subdivision was the equitable defense as contra-distinguished

from the formal answer to the declaration in ejectment. (Tr., p. 32.)

When the case was in the Supreme Court of the State, for its first hearing, that court had before it no question except those raised by the demurrers directed only to the cross-petition or equitable defense. No question raised by the answer of the defendant to the formal declaration in ejectment had at that time been heard by the lower court. After the order of the Supreme Court of the State, sustaining the demurrer to the cross-petition, and after the mandate had taken the case back to the trial court, the Bishop Iron Company filed a replication, or reply, specifically limited to that portion of the defendant's answer not previously demurred to, to wit, to that portion which answered, partly by traverse and partly by confession, the formal declaration in ejectment. (Tr., p. 34.) This is all which the record, in any way, shows upon this subject. And from this it will be seen that the Bishop Iron Company did not, either in fact or legal effect, at any time, withdraw its demurrer to the cross-complaint; and, further, that the reply or replication did not admit anything except such facts as were specifically alleged in the complainant's complaint.

If it is intended to say that the allegations of the cross-complaint are admitted for the purposes of the demurrer, provided such demurrer be properly before this court under the writ of error, then we have no contention with the proposition. That would undoubtedly be the effect of the pleadings. But the facts of the cross-petition would, in that event, be admitted only for the purposes of the hearing upon the demurrer and in no other respect. And that admission would in no way affect the right and duty of the court to take judicial notice of the public records of the General Land Office and the Department of the Interior under the doctrine which we are now discussing.

We submit, in view of the above authorities, that the court in the case at bar should take judicial notice of the records and files of the Land Department appertaining to the case, at least so far as the same are specifically referred to in the cross-petition, and that the facts can be ascertained by an inspection of the decisions in question in the official publication known as "Decisions of the Department of the Interior relating to Public Lands," or from exemplified copies of such decisions filed in the cause.

Second.

An equitable defense may, under the practice act of Minnesota, be pleaded in an action of ejectment; but to prevail over the legal title, the equities upon which such a defense is based must be strong, clear, and decisive. They must be such as, under general practice, would sustain a bill in equity to enjoin the owner of the legal title from proceeding at law. In other words, only such a case can be thus successfully pleaded as would sustain a bill in equity for affirmative relief.

Genl. Statutes of Minn. (Wenzell, 1894), sec. 5236.
McClane *v.* White, 5 Minn. 178 (Gil. 139).
Williams *v.* Murphy, 21 *ib.* 534.

In McClane *v.* White (*supra*), the Supreme Court of the State, speaking directly to this point, said (Gil., p. 150):

"The complaint states, and the answer admits, a good legal title in the plaintiff. Whatever defense the defendant has to the action is entirely of an equitable character. Under the old system of pleadings an equitable defense could not be interposed in an action of ejectment, but under the code this may be done. But to prevail over the legal title, in the absence of any fraud or mistake, or unfair dealing, in the person holding the same, the equities on the

part of the defendant must be shown to be strong, clear, and decisive, and such as would entitle him to a conveyance on a bill filed for that purpose."

And precisely the same rule applies in many, if not all, the States where similar statutes exist, as will be seen by reference to the following cases, selected from among many others, announcing the doctrine:

Wicks *v.* Smith, 18 Kans. 508.
Walton Plow Co. *v.* Campbell, 35 Neb. 175.
Bruck *v.* Tucker, 42 Cal. 352.
Halliday *v.* Strickland, 60 Ga. 151.
Ells *v.* Pac. R.R. Co., 51 Mo. 204.
Ming *v.* Foote, 9 Mont. 222.
Kohn *v.* Old Tel. Min. Co., 2 Utah, 174.

Third.

We submit that the case at the outset might be disposed of upon one single consideration. The plaintiff in error, Hyde, rests his entire case upon the claim that the Land Department improperly found that he had executed an illegal and prohibited contract. This claim he affirmatively pleads by way of equitable defense. Yet his answer does not in any way or manner deny the fact that he executed such a contract and that it is now in existence. The entire equitable defense, when reduced to its essential elements, is simply a claim that the Secretary was not justified, upon the evidence before him, in finding the fact of such a contract.

We submit that the plaintiff in error, so far as the equitable defense is concerned, stands in the position of a defendant in equity, bound under the law to answer fully and to disclose all of the facts within his knowledge. Still further, he is, as to this equitable defense, in the position of a plaintiff in equity, bound to display a pleading

entitling him to affirmative relief. Thus standing he attacks a patent of the United States upon the ground that the Land Department improperly found that he had violated the law and, in substance, had undertaken to swear falsely in his final proof. Yet he does not deny the fact thus found and rests his whole case upon the charge that the record before the Department did not justify that finding. His failure to specifically aver that he had made no such contract is, we submit, fatal to his claim, and the court should, upon that ground alone, affirm the judgment of the court below.

Fourth.

This brings us to the direct question whether the facts appearing by the allegations of the cross-bill, taken in connection with the documents of which the court will take judicial notice, establish a good equitable defence.

The assignments in this court by the plaintiff in error, while large in number, are limited to this one phase of the case, and a like position is also taken by counsel in their brief, where they say (pp. 6, 7):

"The controlling question in the case is whether or not the facts set forth in the answer by Hyde by way of counter-claim constitute a cause of action. * * * Unless Hyde, by virtue of the proceedings taken by him before the Land Department as set forth in his answer, is the equitable owner of the land and entitled to compel a conveyance thereof from those holding the legal title, the plaintiff in the trial court should have recovered."

In support of their contention that the facts set out in the cross-petition make the plaintiff in error the equitable owner of the land and entitle him to compel a conveyance

from the defendants in error, counsel submit, substantially, the following claims:

(*a*) That the order of the Commissioner of the General Land Office, dated March 8, 1889, dismissing Hyde's application to contest the Warren location, filed April 10, 1886, was *ex parte* and therefore is not binding upon the court.

(*b*) That Secretary Vilas had no jurisdiction to render his decision of February 18, 1889, declaring the pre-emption claim of Hyde invalid, because no issue raising that question was involved in the case before him.

(*c*) That the testimony referred to in the decision of Secretary Vilas was only admissible for the special purpose of determining the validity of the scrip location.

(*d*) That this testimony, properly considered, showed nothing more than a mortgage of the premises and that the contract was therefore not obnoxious to law.

(*e*) That, in cases where injustice has been done by a decision of the Department, this court can review the *questions of fact involved.*

Without following in detail, in the order stated, either the assignments of error or the above-enumerated points of the brief, we submit, in answer to all that is therein contained, the proposition that the judgment below, sustaining the demurrers, must be here affirmed because:

1. The finding of the Land Department to the effect that Hyde had entered into a contract by which the title which he would acquire from the Government might enure in part to others than himself was a decision of fact, and as such is final and conclusive upon the courts.

2. That, even if this be otherwise, upon the case as presented to the Land Department the testimony affirmatively showed the existence of a prohibited contract; the Department properly so held, and this court must, upon that ground, affirm the decision of the court below.

1.

Departmental Decision Final.

The exact claim of right under which the plaintiff in error is supposed to have an equitable title is not clearly apparent either from the assignments of error or the brief of counsel. It is referred to at times as a "pre-emption" claim having relation to the date of an alleged settlement made in 1884. At other times it is spoken of as a "preference" right to enter the land. There seems to be confusion in the use of the two terms above mentioned. This peculiarity not only appears in the case at bar, but, as will be observed, runs through all of the cases heard and decided by the Department so far as the presentation of Hyde's claim is concerned. There is no confusion in the Departmental decisions themselves on the subject, but the manner and form in which, under different circumstances, Hyde's claim has been asserted varies apparently according to the exigencies of the occasion. While this peculiarity is not at all material in the view of the case which we take, a reference to the distinction between the two classes of claims, in land jurisprudence, may not be here inappropriate.

In the practice of the Land Department, as it has existed since May 14, 1880, there are two distinct and separate classes of "contests" which can be initiated and which may result in the contestant obtaining title. The first and more ancient of the two classes is that where two different rights or claims in two different individuals are asserted against each other, each being founded upon some prior act or acts connecting the claimant with the paramount source of title. In the second or later class, the contests arise under Section 2 of the act of May 14, 1880 (21 Stat. 140), which

provides that in all cases where a person has contested an entry, paid the land-office fees, and procured the cancellation of the entry so contested, he shall be allowed thirty days from notice of such cancellation within which to enter the premises, as a preferred claimant.

In the first of the above-enumerated classes the contestant wins, if he succeeds at all, by affirmatively establishing some paramount right, claim, or title in himself as against that which is claimed by the contestee; and to this class of cases the act of May 14, 1880, has no application.

In the latter class of cases the contestant does not set up any right, title, or claim in himself, but standing practically in the relation of an informer who is to be rewarded in case of success, obtains, after cancellation, a preferred right to take the lands, title to which he may procure, at his election, under any statute of the United States disposing of the public domain.

In the first class he succeeds because of the superiority of a claim (by reason of seniority or on account of defect in the adversary claim) which he affirmatively sets up; in the latter class he sets up no claim at all, and is simply rewarded as a successful informer against a fraudulent or illegal claim.

The distinction between these two classes of contests is elementary; the difference in the form of procedure is distinctive and characteristic, all of which appears by decisions of the Department too numerous to mention.

As we proceed with an examination of the decisions of the Land Department adverse to Hyde, affecting his claim to the premises involved in the case at bar, it will be observed that these decisions not only dispose of the claim of Hyde as an entirety, but also specifically determine it as falling within each of the two classes above enumerated and reject it as not properly falling within either.

There have been seven decisions by three different Secretaries of the Interior, by each of which the claim of Hyde has been held illegal and invalid. Each of these decisions rejected such claim. And, in pursuance of these repeated adjudications, patent finally issued to Warren, under which the defendants in error now claim. These seven decisions are:

Secy. Vilas, Feb. 18, 1889; Appendix No. 1.

Secy. Noble, Jany. 28, 1891; 12 L. D., 157; App. No. 2.

Secy. Noble, May 31, 1892; 14 L. D. 576; App. No. 5.

Secy. Noble, Nov. 12, 1892; 15 L. D., 415; App. No. 6.

Secy. Smith, July 20, 1894; 19 L. D., 64; App. No. 7.

Secy. Smith, Dec. 21, 1894; 19 L. D., 547; App. No. 4.

Secy. Smith, Apr. 12, 1895; 20 L. D., 324.

To the proceedings in all of the cases in which these decisions were rendered, Hyde was a party. By all seven of said decisions, his pre-emption claim, based upon his alleged settlement in 1884, was declared illegal and invalid; in two of the cases upon full consideration of evidence taken, and in the other five because the questions involved were determined to be *res adjudicata*. Still further, by two of such decisions his claim, treated as one of preference right under the act of May 14, 1880, was rejected as absolutely untenable, after a full and careful hearing.

If, under such circumstances, the action of the Interior Department is not conclusive in the courts upon the claim thus adjudicated, it is hard to imagine a case where that result will obtain. If seven decisions, by three different

Secretaries of the Interior, do not settle a question of this kind, when recourse is afterwards had to the courts, that result must certainly be because some positive and flagrant error is shown to have been committed by the officers of the Land Department.

As hereinbefore stated, the decisions in question arose in connection with what may be termed three separate and distinct proceedings, although two of such proceedings are so connected, in respect to Hyde, as to follow one after the other in natural sequence and continuation. The first of these controversies was that culminating in the decision of Secretary Noble of January 28, 1891, Appendix No. 2. That was the proceeding which was initiated by the contest of Hyde brought against the original Sioux Half-Breed scrip location. The land being then unsurveyed, but covered by the unadjusted location of the Sioux Half-Breed scrip, Hyde made settlement upon the same, filed an application to contest the scrip location and offered to file as a pre-emptor. This resulted in a hearing being ordered; in a trial being had; in a large amount of testimony being taken, affecting both the scrip location and the pre-emption claim of Hyde, and ultimately in a decision by Secretary Vilas,—that of February 18, 1889. In this decision, after reciting in full all the proceedings by which the claim reached him for consideration, and after quoting certain portions of the testimony relating to Hyde's pre-emption claim, the Secretary said:

"Further evidence than that above quoted from the testimony of Hyde and McDonald is unnecessary to show that they have, by contracts which they admit having made, disqualified themselves from taking the land under the pre-emption law.

* * * * * * *

"The testimony of the two claimants establishes beyond question that the statements made in their applications to contest, that their settlements were made wholly for their own use and benefit, were not well founded, and that it would be impossible for either of them to make the affidavit required by section 2262, R. S. U. S., 'that he has not directly or indirectly made any agreement or contract, in any way or manner, with any person whatever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself.'

"In view of this record and proof, it appears to be the duty of the Department to dispose of these claims of pre-emption. A hearing has been had upon the validity of them, in which the evidence was adduced fully, and upon which the material facts appear to have been sufficiently elicited to leave no doubt. Whatever rights they might have established would, under a familiar rule of the Department, have been regarded as fixed at the time when they made their application to file. Their applications to file must be treated as if they had been allowed, subject to the rights of others; and it now appears that they ought to be canceled, if filed. Their appeal (which is sent up in the record) from the rejection of their applications appears to bring the whole matter before the Department; and in the exercise of the power of supervision vested in the Department by law, it seems to be demanded that upon this disclosure of the facts the proper action should be taken. If there had been no hearing upon this question the proper action would be, upon a suggestion of such information, to direct a hearing to be had; but inasmuch as a hearing has been had, and as the testimony which shows the absolute impossibility of perfecting a pre-emption title in these claimants has proceeded from themselves, testifying under oath, there appears no reason for directing a further hearing.

"If their declaratory statements were now to be filed as of that date, the duty would rest on the Department to cancel them, in accordance with the ordinary practice in such cases."

After the rendition of this decision by Secretary Vilas, both Eaton, the Sioux Half-Breed claimant, and Hyde filed motions for review. The date of the filing of these motions does not appear, but as Secretary Vilas retired from office March 4, 1889, and was succeeded by Secretary Noble within thirty days after the date of Secretary Vilas' decision, and as thirty days from notice of decision are allowed for filing motions for review (Rule of Practice No. 77), it is evident that such motions were not filed in time for disposition by Secretary Vilas before his retirement from office. They thus went over for action by Secretary Noble, who, after elaborate consideration, and even after admitting *ex-parte* affidavits filed on behalf of Hyde, reaffirmed the decision of his predecessor so far as it held the claim of Hyde to be in violation of law and invalid. In this decision Secretary Noble, disposing of this question, after reciting the various steps in the proceedings by which the case reached the Department, after trial at the local office, said (12 L. D., 159 *et seq.*):

"At this hearing testimony was submitted for and against, not only the scrip locations, but also the claims of these pre-emption applicants. The local officers found in favor of the validity of the scrip locations, and, in view of that fact, declared it unnecessary to conside 'the *bona fides* of Hyde and McDonald or their rights under the pre-emption law.'

"The decision rendered in your office made no disposition of the applications of Hyde and McDonald. The applications of these parties to file pre-emption declaratory statements came up with the record in the case and it was entirely competent for this Department, in the exercise of the jurisdiction conferred upon the head of it, to consider and determine all questions presented by the record."

And, after referring to the alleged misquotation and misapprehension of Hyde's testimony, the Secretary added (p. 160):

"This change does not, however, destroy the effect of the testimony taken as a whole, or necessarily demand a different conclusion. There is testimony to sustain the finding on this particular phase of this case, and it is not shown that such finding was against the palpable preponderance of the evidence. In such cases a review will not be allowed."

And then, further proceeding to a discussion of the affidavits filed on this question in support of the motion, the Secretary added:

"This is apparently an effort to take the tract described out of the contract mentioned and to clear it of the taint attaching to the claim. A contract made before entry to convey any part of the land filed for renders invalid the whole claim. The statements made in these affidavits do not, in my opinion, destroy the force of the testimony given at the hearing or call for further action in these claims."

It is thus seen that in this first proceeding the preemption claim of Hyde, upon testimony taken in a hearing which he himself procured and testimony which he himself and his witnesses furnished, was rejected because both Secretary Vilas and Secretary Noble found that he had made a contract under and by the terms of which the title which he might procure would enure to others than himself, and that his claim was therefore in violation of law and should be rejected, and, so far as any record had been made of the same, canceled.

The second proceeding, to which Hyde was a party, and in which some of these decisions were made, was the contest initiated by Hartmann against the Warren Chippewa Half-Breed scrip location on the 19th day of March, 1889. On this last-mentioned date Hartmann filed a contest, being one strictly under the act of May 14, 1880, against the

Warren location, alleging various grounds of illegality therein. It will be borne in mind that at this date the pre-emption claim of Hyde had been rejected by Secretary Vilas as hereinbefore recited. Other parties besides Hartmann also applied to contest the Warren location. Hyde became a party to this proceeding, insisting therein that his pre-emption claim was valid, and also that he had a right to contest under an application filed previously, which will be hereinafter noticed. Upon this situation, a hearing was ordered by the Commissioner of the General Land Office upon the application of Hartmann to contest, the Commissioner holding that Hartmann had presented the first perfected application in that regard. From this decision an appeal was taken to the Secretary, Mr. Noble being then in office, and this last-mentioned officer affirmed the decision of the Commissioner and held that Hartmann had presented the first application, with a *prima facie* case against Warren and was entitled to a contest under said act of 1880. In this decision, Secretary Noble, speaking to the question of the rights of these parties to contest the Warren location, said (14 L. D., p. 588):

"From his own showing, the contest application of Hyde, corroborated by the affidavits of Powers and McDonald, was not filed until October 29, 1889, long subsequently to the applications of Hartmann, Chandler and Barrick, and it appears that the hearing ordered upon his application of April 10, 1886, was revoked by you for the reason that the Department held, in Hyde *et al. v.* Eaton *et al.*, on February 18, 1889, and affirmed on review (12 L. D., 157), that Hyde's pre-emption claim for said tract was illegal."

Hyde filed a motion for review of this last-mentioned decision, assigning, among many other assignments, error in passing upon his rights as a pre-emption claimant. The Secretary, in denying this motion for review, by his decision

of November 12, 1892, and referring particularly to the pre-emption claim of Hyde, said (15 L. D., 416):

"The right of Hyde as a pre-emption claimant, under the settlement upon which he bases his claim to this land, was involved in the case of Hyde *et al. v.* Eaton *et al.*, decided February 18, 1889 (not reported) and again on motion for review on January 28, 1891 (12 L. D., 157). It was there found that this settlement was not made in good faith, for his own use and benefit, and that he therefore acquired no rights by virtue of that settlement. That decision disposed of his claim, not only as to the particular tracts of land involved in that case, but also as to all the tracts which he claimed under such settlement; that is, his claim as a whole was held to be invalid after a full investigation and opportunity to Hyde to be heard in defense thereof. This being the case, it was wholly unnecessary to again go over the same ground, when some other person not a party to the former proceedings presented a claim to part of the land. It was not error to dispose of Hyde's pre-emption claim, as was done in the decision complained of, by citing the former decision of the Department holding it invalid. His rights as a contestant were not definitely disposed of in the decision attacked by this motion, but consideration thereof was simply postponed until the prior contests could be decided."

Under these two last-mentioned decisions of Secretary Noble, the contest of Hartmann proceeded; Hyde appeared and demanded to be made a party thereto and to be allowed to offer evidence in support of his *pre-emption claim;* these demands were refused by the local officers; Hyde appealed to the Commissioner; that officer affirmed the decision of the Register and Receiver; Hyde appealed to the Department, and the then Secretary (Hon. Hoke Smith having succeeded Mr. Noble), by the decision of July 20, 1894, affirmed the decision of the Commissioner of the General Land Office. In this decision, Secretary Smith, refer-

ring to the position of Hyde in the case and to his demand to be recognized as a pre-emption claimant, said (19 L. D., 76):

"It appears that Thomas W. Hyde appeared at the hearing before the local officers, and sought to introduce testimony to establish a pre-emption claim to a part of the land in controversy, to wit, the N.E. ¼ of the S.W. ¼ of Sec. 30. The register and receiver declined to receive the testimony offered, or to admit Hyde as a party to the hearing, which was affirmed by the decision of your office under consideration. Hyde appeals to the Department.

"There must necessarily be somewhere a termination of all controversies. If there ever was a case before the Department to which the doctrine of *res adjudicata* is applicable it is the case of Mr. Hyde. He has had no less than four hearings before the Department, on appeal or on review, and he now presents himself for the fifth time with a persistence which is worthy of admiration."

The Secretary thereupon, referring to the case of Hyde *v.* Warren (15 L. D. 415), quotes what is therein said, being the language which we have above ourselves quoted, and then adds:

"There was therefore no error in the decision of your office in holding that the matter was *res adjudicata*."

The next and third proceeding to which Hyde was a party, and in which his claim was disposed of, was the one which grew out of the cancellation of the Sioux Half-Breed scrip location under Secretary Vilas' decision of February 18, 1889. This proceeding is not mentioned or referred to in the cross-petition, and light upon the subject is only available in consequence of the judicial notice which the court will take of the official records of the Department.

All its essential features will be found by reference to

We submit, that a defendant cannot thus, even under the practice of Minnesota allowing the combination of these legal and equitable defenses, proceed to the court of last resort in that State upon a demurrer, and when there defeated, return to the District Court for a trial of the other issues, and yet preserve for review in this court the questions raised upon the demurrer.

Respectfully submitted.

JAMES K. REDINGTON,
Attorney for Defendants in Error.

FRANK B. KELLOGG,
J. H. CHANDLER,
Of Counsel.

APPENDIX No. 1.

Decision of Secretary Vilas of February 18, 1889, *in Hyde and McDonald vs. Eaton et al.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *Feb.* 18, 1889.

Vol. 11–193.

HYDE & MCDONALD
v.
EATON & STRAM.
} Sioux Half-Breed Scrip.

The Commissioner of the General Land Office:

SIR: I have considered the case of Thomas W. Hyde and Angus McDonald *v.* Frank W. Eaton as attorney in fact for Orillie Stram *née* Moreau, on appeal by the latter from the decision of your office, dated August 4, 1888, holding for cancellation Sioux Half-Breed scrip, No. 19 D and 19 E, located and adjusted as follows:

Scrip No. 19 D upon lots 3, 5 and 6 and S.E. ¼ of N.W. ¼ Sec. 30, and that numbered 19 E upon lots 1 and 2 and S.W. ¼ of N.E. ¼ and N.W. ¼ of S.E. ¼. same section, Tp. 63 N., R. 11 W., Duluth, Minnesota.

It appears that Frank W. Eaton as attorney in fact for said Orilie Stram *née* Moreau, a Sioux Half-Breed Indian, filed in the Duluth, Minnesota, local land office, on June 16, 1883, the scrip above mentioned, and located the same on certain unsurveyed land, in amount three hundred and twenty acres, which locations were subsequently adjusted by the local office, and approved and posted by your office to embrace the tracts above described.

Said Half-Breed scrip bore date November 24, 1856, and had been issued under the provisions of the Act of July 17, 1854 (10 Stat. 304), to the Sioux Half-Breed named above.

July 20, 1885, Angus McDonald presented at the local office a pre-emption application for lot 2 and the N. ½ of S.E. ¼ and S.W. ¼ of N.E. ¼ of said section 30, which that office rejected, because the N.E. ¼ of S.E. ¼ was denominated swamp and overflowed land, and as to the residue of the tract, because the date of settlement as alleged in the application to file did not antedate the unadjusted scrip location No. 19 E, with which it conflicted.

On the same day (July 20, 1885) Thomas W. Hyde applied to make pre-emption filing for lots 5 and 6 and S.E. ¼ of N.W. ¼ and N.E. ¼ of S.W. ¼ of the same section (30), which application the local office rejected, for the reason that the alleged date of settlement did not antedate the unadjusted scrip location, No. 19 D.

November 14, 1885, a hearing was ordered by your office upon the application of McDonald and Hyde, who allege "that the scripee never made any improvements whatever upon said land, either in person or by an agent or attorney, and that said land, at the date of the attempted locations, was unsurveyed and belonged to the class of land only locatable with such scrip after the scripee shall have made improvements upon the same."

In support of the charges thus made was filed a copy of an affidavit (the original is now in the record) made October 9, 1884, by the scripee, in which she denied ever having given to said Frank W. Eaton, either directly or indirectly, a power of attorney, or any authority of any kind to locate said scrip, or to erect buildings and make improvements on the land in controversy, or upon any other land, for her use and benefit.

In refutation of the denial made as above by the scripee, Eaton filed copies of two powers of attorney given him by said scripee and her husband, May 25, 1883, conferring upon him the power and authority to locate said scrip, and to make the improvements which, under the act of 1854, were necessary before location could be made on unsurveyed lands; also, to do any other act necessary to be done in the premises, in order to secure a permanent and *bona fide* location, in the same manner as if done by them personally.

The case proceeded to hearing, which was held April 6, 1886.

* * * * * *

Upon a careful examination of the entire record, I find the facts to be substantially as stated by your office decision and outlined herein.

Epitomized, they are as follows:

The scripee disposed of her scrip, surrendering possession thereof to some one now unknown. Said scrip was accompanied by two powers of attorney, executed in blank, one giving authority to some one, not then named, to locate the scrip; the other giving a like authority to sell the land located upon. The scrip, after many years and after passing through several hands, lodged in the hands of Frank W. Eaton, who thereupon filled up the blanks in the power of attorney to locate, inserting his own name as that of attorney in fact for such purpose. He employed others to make slight improvements on the land in question (then unsurveyed) and after such improvements, which were scarcely deserving of the name, he located the scrip as attorney in fact for Orilie Stram, the scripee.

The blanks in the other power of attorney (that to sell) were filled up by inserting the name of Leonidas Merritt, who, it appears, was a business partner of said Frank W. Eaton, and said Merritt, as attorney in fact of the scripee,

executed certain warranty deeds transferring and passing title to the lands covered by the scrip locations to certain parties therein named, it appearing that said parties were Eaton, who had made the locations, and three men, Edward Byrne, James H. Powers and Joseph Clement, who had been by him, or through his agency, employed to make the improvements above mentioned.

Money consideration was expressed in said deeds, but it is apparent from the evidence that the real consideration, so far as Byrne, Powers and Clement were concerned, was what they had done in making the improvements. They got an undivided one-third interest. The residue went to Eaton.

The scripee never saw the land. At the date of the location she had never seen Eaton, who acted as her attorney in fact, and did not then know that there was such a person in existence. She had, as a matter of fact, sold the scrip long prior to the location, and had no personal interest in the land, nor were the improvements made for her personal use and benefit. It was a matter of no moment to her where the scrip was located, or whether it was located at all or not. Her actual interest in the matter ceased when she disposed of the scrip. It is admitted by her so-called attorneys in fact that she was to have no interest in the land. For a long time she directly and positively repudiated Eaton and Merritt as her attorneys in fact, denying that they acted for her in any capacity whatever. Afterwards, and but a few days prior to the hearing, she ratified by deed what had been done by them.

This ratification, it is evident, was procured at the solicitation of Eaton or Merritt, or both, and for a consideration. But such ratification does not change the fact that the improvements and location, though made under the guise of a power of attorney, were made, not under the direction

and in the interest of the scripee, but for the benefit solely of another not even known to the scripee, viz., Eaton, who had inserted his name as attorney in the power executed in blank. If the location of the scrip was illegal and invalid, then the deed of ratification could not give it validity—could not vitalize that which originally had not in it the germ or essence of legal vitality.

This case is, in all essential particulars, like that of Joseph W. Allen *et al. v.* Lewis Merrill *et al.*, decided by me this day, so far as the method of making the scrip locations is a matter of concern, and the reasons of that case are in this particular applicable to this. Following the ruling of that case, I must hold that the scrip locations here in question are invalid, and your office decision so holding is affirmed.

There remains for disposition the rights of Hyde and McDonald. It is asserted that the case is not in such a position that any determination ought to be made as to these claims, and that must be determined by a view of the record and proceedings taken.

It appears that on the 9th day of October, 1884, Hyde filed with the Register a paper addressed to the Register and Receiver, in the caption described as being "An application for leave to contest the pretended entry with Sioux-Half-Breed Certificate No. 19 E. for one hundred and sixty acres issued to Orilie Moreau, on November 24, 1856, and attempted to be located on the following-described land, to wit," describing the land; and that in that application, after the allegation attacking the location, the following appears:

"That said contestant is a single man over 21 years of age, and has declared his intention to become a citizen of the United States; that he does not own 320 acres of land

in any State or Territory; that he has not left land of his own in this State to reside on the public lands, and that he has never heretofore exercised his right under the pre-emption law.

"That heretofore, to wit, on the 20th day of August, A. D. 1884, the said contestant made settlement on the said described land with a view to inhabiting and cultivating the same for his own exclusive use and benefit, and intends to make his declaratory statement for said land under the pre-emption laws of the United States as soon as the surveyed plat of township 63 N., Range 11 W., of the 4th P. M. shall be returned to the United States land office at Duluth, Minn.

"Wherefore your petitioner requests that this contest may be granted and a day set for the hearing thereof."

Attached to this application was an affidavit of verification, sworn to on the 29th of September, 1884.

This application is stated in the Commissioner's order for a hearing, hereinafter mentioned, to have been transmitted by the Register to the General Land Office October 31, 1884, and to have been supported by a copy of an affidavit of the scripee, which has been before spoken of.

On the 20th of July, 1885, Hyde made application to file the declaratory statement previously mentioned in this opinion, which was rejected, and thirty days allowed by the Register for appeal. On the 25th day of August, 1885, the Register transmitted Hyde's appeal from that decision to the General Land Office.

All the proceedings on the part of McDonald in respect to the land claimed by him correspond exactly with those of Hyde as to the land claimed by him, and were made by the same attorneys and at the same time respectively.

Afterward, on the 14th day of November, 1885, the Commissioner of the General Land Office, by letter "C" of that date, ordered a hearing, in which, after reciting the allegations for and against the validity of the scrip, he proceeds:

"In view of the conflicting statements respecting the legality of these locations, I deem it proper that a hearing should be had, that the respective parties may have an opportunity to submit such proof as they may have *in support of their allegations*, and that this office may be possessed of *all the facts possible* in the matter, and the same is hereby ordered.

"You will notify all parties in interest of the time and place of hearing, and at the proper time thereafter you will transmit to this office the testimony taken thereat, with your opinion thereon."

Under this order of the Commissioner, when the hearing came to be held, it seems to have been assumed by all parties that the rights of Hyde and McDonald as pre-emptors were involved; and voluminous testimony was taken, not only with respect to the rights of the scrip locators, but with respect to the rights of the pre-emptor. Upon the conclusion of the hearing the Register and Receiver, being of opinion that the scrip locations were valid, disposed of the pre-emptors' claims as follows:

"The *bona fides* of Hyde and McDonald, or their rights under the pre-emption law, need not be considered here, as the question of their claims is contingent upon their ability to set aside the scrip locations and thus render the land subject to pre-emption settlement.

"Upon this showing of fact, we conclude that the contestants have failed to make out a case, and that the proceedings should be dismissed. It is so ordered."

The decision of the Assistant Commissioner makes no allusion to the contest in regard to Hyde and McDonald, simply reversing the decision of the local officers as to the validity of the scrip location.

Upon examination of the testimony taken at the hearing, the following appears in the examination of Hyde:

"Q. Did you have any contract with Mr. White, in writing or otherwise, by which he was to receive any compensation or interest in the land?

"A. Yes; there was a contract.

"Q. Where is it?

"A. I don't know.

"Q. When and where did you last see it?

"A. I have not seen it since it was drawn up by M. White.

"Q. What did it contain?

"A. It contained that, when I proved up, I was to secure him a one-half interest."

McDonald testified as to the land covered by his pre-emption claim:

"Judge White has no interest in it. There is an understanding that he is to have an interest in it if we succeed in this trial; he is to have a half interest. The arrangement with Hyde is the same as mine. White is to have half if we succeed in this.

"James H. Power is also to have an interest in it if we succeed. I don't know how much he is to get. I agreed to give him an interest if we succeed in getting the land."

He further testified:

"Mr. White is paying the expenses of the claim with the understanding that he is to have half of it after we secure it."

Again:

"I am to let him have an interest in the land when I get it, to pay him for his time and services. The contract I have with Mr. White for his one-half is in writing."

When asked how he could give White a half interest unless he should deed to him one-half, he answered, "I could not very well."

White, when put on the stand, testified that after diligent search he was unable to find the contract.

Further evidence than that above quoted from the testimony of Hyde and McDonald is unnecessary to show that they have, by contracts which they admit having made, disqualified themselves from taking the land under the pre-emption law.

Counsel, in one of the briefs in the case, aver as to McDonald that the records of your office will show that he has already exhausted his pre-emption right by having made a pre-emption filing, and having filed a formal relinquishment of his claim thereunder. I have not attempted to test the correctness of this averment by an inspection of the records of your office. It is deemed unnecessary in view of the testimony of Hyde and McDonald, the pre-emption claimants, as to their contract to sell.

The testimony of the two claimants establishes beyond question that the statements made in their applications to contest, that their settlements were made wholly for their own use and benefit, was not well founded, and that it would be impossible for either of them to make the affidavit required by section 2262, R. S., "that he has not directly or indirectly made any agreement or contract, in any way or manner with any person whatever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself."

In view of this record and proof, it appears to be the duty of the Department to dispose of these claims of pre-emption. A hearing has been had upon the validity of them, in which the evidence was adduced fully, and upon which the material facts appear to have been sufficiently elicited to leave no doubt. Whatever rights they might have established would, under a familiar rule of the De-

partment, have been regarded as fixed at the time when they made their application to file. Their applications to file must be treated as if they had been allowed, subject to the rights of others; and it now appears that they ought to be canceled, if filed. Their appeal (which is sent up in the record) from the rejection of their applications, appears to bring the whole matter before the Department; and in the exercise of the power of supervision vested in the Department by law, it seems to be demanded that upon this disclosure of the facts the proper action should be taken. If there had been no hearing upon this question, the proper action would be, upon a suggestion of such information, to direct a hearing to be had; but inasmuch as a hearing has been had, and as the testimony which shows the absolute impossibility of perfecting a pre-emption title in these claimants has proceeded from themselves, testifying under oath, there appears no reason for directing a further hearing.

If their declaratory statements were now to be filed as of that date, the duty would rest on the Department to cancel them, in accordance with the ordinary practice in such cases.

This leaves to be considered one other branch of the case as now presented by the record. On April 28, 1887, one Fred L. Huntress filed formal applications to contest the pre-emption claims of said Hyde and McDonald, respectively, his charge being that said claims were initiated not in good faith to appropriate the lands to their exclusive use, but for speculative purposes, they having agreed to convey title to other parties when procured by them.

Huntress, in his affidavit of contest, asks that a hearing be ordered to enable him to substantiate by competent proof the charges made.

Counsel for Huntress, however, argues in a brief recently filed, that further hearing is unnecessary, and that the

asserted claims of Hyde and McDonald may properly be rejected and finally disposed of on the record as it now exists.

It is therefore asked that such action be taken, and the scrip locations, as well as the pre emption claims of said Hyde and McDonald being disposed of and the record cleared of any claim to the land, that he (Huntress) be accorded the preference right of entry on said lands.

Notwithstanding the foregoing judgment to some extent was anticipated by the petition, this proceeds on the record, all of which had been made up before Huntress came into the case as a pretended contestant, and was in no way or manner aided by what he did. His acts had nothing whatever to do with bringing about the rejection of either the scrip claims or those of Hyde and McDonald. Besides, an application to file a declaratory statement is hardly subject to contest. He is, therefore, in no position to claim a preferred right of entry as a successful contestant, and his application to be so considered and treated must be denied. This disposes of all the claims and asserted claims to the land, so far as disclosed by the record before me, and leaves the land in question open to disposal under the public land laws of the United States applicable thereto, and such is the judgment of this Department.

The papers in the case are herewith returned.

Very respectfully,

WM. L. VILAS,
Secretary.

APPENDIX No. 2.

Decision of Secretary Noble of January 28, 1891, *in Case of Hyde et al. v. Eaton et al.*, 12 *L. D.* 157.

I have considered the motions filed by the parties in interest asking for a review of departmental decision of February 18, 1889 (unreported), in the case of Thomas W. Hyde and Angus McDonald *v.* Frank W. Eaton, and Orilie Stram and Fred F. Huntress, second contestant, involving Sioux Half-Breed scrip locations of lots 3, 5 and 6, and the S.E. ¼ of the N.W. ¼ Sec. 30, T. 63 N., R. 11 W., under certificate 19 "D," and of lots 1 and 2 and the S.W. ¼ of the N.E. ¼, and the N.W. ¼ of the S.E. ¼, same section, under certificate 19 "E," in the Duluth, Minnesota, land district; also the application of Thomas W. Hyde to file pre-emption declaratory statement for lots 5 and 6, the S.E. ¼ of the N.W. ¼, and the N.E. ¼ of the S.W. ¼ of said section, and the application of Angus McDonald to file pre-emption declaratory statement for lot 2, the N. ½ of the S.E. ¼ and the S.W. ¼ of the N.E. ¼ of said section 30; and also the application of Huntress to contest both the scrip locations and the claims of Hyde and McDonald.

The facts pertaining to these various claims are sufficiently set forth in the decision complained of, and it is not deemed necessary to recapitulate those facts here.

On the part of the scrip claimants, twenty-one specifications of error are assigned. These specifications, except such as are hereinafter specifically mentioned, present questions which were presented in the motion for review in the case of Allen *et al. v.* Merrill *et al.*, and which are in

the decision this day rendered therein fully discussed. The conclusion reached there is adopted here, and further discussion of those questions is unnecessary.

* * * * * * *

This disposes of all specifications of error in the motion for review filed in behalf of the claimants under said scrip locations adversely, and the conclusion reached in the original decision in regard to these locations will be adhered to.

The motion for review filed in behalf of the pre-emption claimants contains sixteen specifications of error, alleging in substance that the merits of these claims were not brought in question by the order for a hearing or the notice issued thereon; that the testimony touching the validity of those claims should have been excluded; that even admitting such testimony, it is not sufficient to warrant the conclusion reached; that the testimony was misquoted in said decision; that it was error to hold that the appeal of these parties from the action of the local officers rejecting their respective applications to file declaratory statements, which appeal was never acted upon by your office, was sufficient to bring their claims before this Department for consideration; and that it was error to refuse them a preference right of entry.

On October 9, 1884, Hyde and McDonald each filed a paper, duly verified by affidavit, termed "an application for leave to contest" the scrip locations mentioned herein, in which applications the qualifications of the respective parties as pre-emptors were duly set forth, and in each of which it was alleged that the party making the same had settled upon the land described therein "for his own exclusive use and benefit" with the intention of filing declaratory statement therefor under the pre-emption laws. On July 20, 1885, these parties each presented his declaratory statement

for the tract claimed by him, which statements were rejected by the local officers. From this action of the local officers the applicants each filed an appeal, which appeals were transmitted to your office August 25, 1885. With these facts thus presented, your office ordered a hearing. At this hearing testimony was submitted for and against, not only the scrip locations, but also the claims of these pre-emption applicants. The local officers found in favor of the validity of the scrip locations, and in view of that fact, declared it unnecessary to consider "the *bona fides* of Hyde and McDonald or their rights under the pre-emption law."

The decision rendered in your office made no disposition of the applications of Hyde and McDonald. The applications of these parties to file pre-emption declaratory statements came up with the record in the case and it was entirely competent for this Department, in the exercise of the jurisdiction conferred upon the head of it, to consider and determine all questions presented by the record. The testimony alleged to have been misquoted is contained in the following extract from the testimony of Hyde found in the original decision:

Q. Did you have any contract with Mr. White in writing or otherwise by which he was to receive any compensation or interest in the land?

A. Yes; there was a contract.

Q. Where is it?

A. I don't know.

Q. When and where did you last see it?

A. I have not seen it since it was drawn up by Mr. White.

Q. What did it contain?

A. It contained that, when I proved up, I was to secure him a one-half interest.

It seems the last answer should have read: "It contained

that, when I proved up, I was to secure him *on* a one-half interest." This change does not, however, destroy the effect of the testimony taken as a whole or necessarily demand a different conclusion. There is testimony to sustain the finding on this particular phase of this case, and it is not shown that such finding was against the palpable preponderance of the evidence. In such cases a review will not be allowed. Croghan Graves (9 L. D. 463.)

After the filing of the motions for review herein, to wit, on July 10, 1889, affidavits of Hyde, McDonald, and S. F. White were filed. Hyde in his affidavit sets forth in substance that he settled upon this land and built a house on the N.E. ¼ of the S.W. ¼ of said Section 30, wherein he has continued to reside; that his improvements have cost, as he verily believes, to exceed $3,000; that whatever agreement he had with White did not affect or refer to the above-described tract, upon which his house stands, but referred only to the land claimed under the scrip locations; that said agreement was "That if at the time said contest should be ended in favor of affiant said affiant should be owing for services in contest, then and in that event he should secure the payment of said services upon the undivided one-half of said land"; that as a matter of fact he has paid his attorney from time to time in cash and has paid him in full, and that affiant never contemplated giving said attorney any interest in the land, but always contemplated paying him in cash for his services. McDonald sets forth that his agreement with White was that he would secure the payment of any sum that might be due for attorney fees at the close of the contest by giving a mortgage on a one-half interest in said claim, and that he has already paid his attorney in full in cash. White's statement, in so far as it relates to the matter of the contract between him and these parties, is as follows:

Deponent further says that, while he has not seen the written contract between himself and Hyde for a long time, and cannot give the exact terms of said contract, that he does remember that said contract contained a description of the lands supposed and intended to be affected thereby and that description does not include the northeast quarter of southwest quarter of section No. 30 aforesaid.

This is apparently an effort to take the tract described out of the contract mentioned and to clear it of the taint attaching to the claim. A contract made before entry to convey any part of the land filed for renders invalid the whole claim. The statements made in these affidavits do not, in my opinion, destroy the force of the testimony given at the hearing or call for further action of these claims. (Smith *v.* Custer *et al.*, 8 L. D., 269.)

The question as to whether these parties, Hyde and McDonald, or either of them, were entitled to a preference right of entry was not expressly decided in the decision complained of, but it may perhaps be said that question was inferentially decided adversely to them by the declaration that the land was "open to disposal under the public land laws of the United States applicable thereto." Any question as to their preference right of entry would arise only upon application within thirty days after due notice of the cancellation of the scrip locations to exercise such right, and it ought not to be decided prior to that time. Saunders *v.* Baldwin (9 L. D., 391), and authorities there cited.

The decision complained of will be modified to the extent of saying that the question as to a preference right of entry in either of these parties is not decided. It is not intended herein to express any opinion whatever upon that question.

It is alleged that a part of the land in question has been entered by other parties since the promulgation of said de-

partmental decision, and if this be true those parties will be entitled to notice if the attempt shall be made to exercise a preference right of entry.

* * * * * * *

This disposes of all questions arising under the various motions for review, and the decision complained of is modified in the particulars indicated herein.

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APPENDIX No. 3.

Part of Commissioner's Decision of September 8, 1893, *in Case of McDonald et al. v. Hartman et al.*

* * * * * *

But even if this were otherwise, and the pre-emption claims were now the proper subject of consideration, I am entirely satisfied, upon the evidence, that the grounds upon which the two decisions referred to proceeded were well-founded in point of fact. Without attempting at length to discuss the voluminous testimony upon this particular point, I deem it sufficient to say that a careful consideration thereof satisfies me of the existence of an illegal and prohibited contract in respect to the lands claimed by these parties under the pre-emption law. The testimony in the case at bar clearly and conclusively establishes that fact, even if it did not satisfactorily appear in the proceeding resulting in the two decisions mentioned. I find from the testimony in the case at bar that the pre-emption claims of these parties were not initiated in good faith, but were established under a written contract by the terms of which the title procured from the United States would enure, in part at least, to others than the claimants and that for this reason, as found and determined by Secretary Vilas and Noble, the claims are invalid and must upon their merits be rejected.

I accordingly find and hold that the claims of these parties here presented are invalid and must be denied.

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APPENDIX No. 4.

Decision of Secretary Smith of December 21, 1894, *in case of McDonald et al.* v. *Hartman et al.*, 19 *L. D.* 547.

The land here involved in this appeal is located in the Duluth, Minnesota, land district, and is described as follows: lots 3, 5, and 6, and the S.E. ¼ N.W. ¼, and N.W. ¼ S.E. ¼ of Sec. 30, T. 63 N., R. 11 W.

The history of the case, as gleaned from one of the most voluminous records probably ever transmitted to the Department, is briefly as follows:

Prior to the beginning of the controversy, said tracts were covered by certain Sioux Half-Breed scrip locations, made by one Frank W. Eaton, as the attorney in fact of Orille Stram, which locations, by reason of conflict with pre-emption claims asserted by Angus McDonald and Thomas W. Hyde, were held invalid by this Department, February 18, 1889. Not only did said decision (unreported) hold said scrip locations invalid, but it also held the pre-emption claims of Hyde and McDonald to be invalid, and cleared the record of all conflicting claims to said land, as revealed by that case, in the following language:

This disposes of all the claims and asserted claims to the land, so far as disclosed by the record before me, and leaves the land in question open to disposal under the public land laws of the United States applicable thereto, and such is the judgment of this Department.

That decision, on motion for review, was reaffirmed January 28, 1891 (12 L. D. 157), with the single modification

that the Department declined to pass on the claim of Hyde and McDonald that, as successful contestants, they were entitled to the preference right to enter said land, the language of the decision on that point being as follows:

Any question as to their preference right of entry would arise only upon application within thirty days after due notice of the cancellation of the scrip locations to exercise such right, and it ought not be decided prior to that time. Saunders *v.* Baldwin (9 L. D., 391), and authorities there cited.

The decision complained of will be modified to the extent of saying that the question as to a preference right of entry in either of these parties is not decided. It is not intended herein to express any opinion whatever upon that question.

The departmental decision of February 18, 1889, *supra*, was promulgated by your office on February 19, and was received by the local office at Duluth on the evening of February 22, a national holiday. On the morning of February 23, prior to nine o'clock, a crowd of men, some of whom had been there for several hours, was gathered in the hall or lobby in front of the door of the local office. At nine o'clock the door was opened from the outside by a clerk of the local office, and the crowd rushed in. In a very brief space of time a number of applications for different subdivisions of the lands in question were presented to the Receiver. The applications made by the parties hereto, being the only ones presented for consideration herein, were as follows:

Emil Hartman: Lot 6, with Porterfield warrant No. 74: S.E. ¼ N.W. ¼ with Valentine scrip E. No. 117; N.W. ¼ S.E. ¼, with Porterfield warrant No. 1; and the additional hd. application of Thos. Reed for lots 1 and 2, and S.W. ¼ N.E. ¼, all said lands being in said Sec. 30.

Charles P. Wheeler, by his attorney, Warren N. Draper, offered to file on S.E. ¼ N.W. ¼, Valentine scrip E. No. 259; S.W. ¼ N.E. ¼, Valentine scrip E. No. 270; N.W. ¼ S.E. ¼, Porterfield warrant No. 98. Also as attorney in fact of one David Moyer, Wheeler, by said Draper, presented soldier's additional homestead certificate for lots 3, 5 and 6 of said Sec. 30; also as attorney for Warren Wing, Wheeler, by the said Draper, presented soldier's additional homestead certificate for lot 2 for said Sec. 30.

Reuben E. Lawrence: by Samuel C. Brown, his attorney in fact, filed soldier's additional certificate for lot 6 and S.E. ¼ N.W. ¼ of said Sec. 30, and

William M. Stokes: by said Brown, as attorney in fact, filed soldier's additional certificate for the S.W. ¼ N.E. ¼, and the N.W. ¼ S.E. ¼ of said Sec. 30.

William Alden and Houghton E. James, by J. K. Person, their attorney, presented homestead applications, the former for lots 3, 5 and 6 and the S.E. ¼ N.E. ¼ (lot 2), and the latter for lots 1 and 2 and the S.W. ¼ N.E. ¼ and N.W. ¼ S.E. ¼ of said Sec. 30—both of said applications having been presented and rejected on February 19 preceding, of which reference will be made later on.

Daniel C. Sullivan and Carroll M. Mauseau, during the afternoon of February 23, filed homestead applications, the former for lots 3, 5, and 6 and the S.E. ¼ N.W. ¼, alleging settlement thereon February 22, 1889, and the latter for lots 1 and 2 and S.W. ¼ N.E. ¼, N.W. ¼ S.E. ¼, alleging settlement thereon February 22, 1889.

The question as to the priority of the applications presented at the opening of the office on the morning of the 23d was taken under advisement by the local officers until later in the day. Some time during the afternoon they gave their decison, awarding to Emil Hartman all the lands applied for by him as above set forth, and to David Moyer,

the two forty-acre tracts applied for by him, as above stated, and rejected all the other applications made for conflict with the allowed claims of Hartman and Moyer. From this action of the local officers various appeals were taken. Pending those appeals, however, a motion to review the departmental decision of February 18, 1889, was filed by Hyde and McDonald, which was finally disposed of by the decision of January 28, 1891, *supra*.

In closing out that case (the motion to review) and upon consideration of the appeals above referred to, your office, by letter "H" of March 13, 1891, ordered a hearing to be had, in order that all the parties to the controversy might have an opportunity to present their claims and evidence in support thereof.

The hearing was set for June 8, 1891. Prior to that date, however, viz., on April 2, 1891, Hyde made homestead application for lots 5 and 6, the S.E. ¼ N.W. ¼ and N.E. ¼ S.W. ¼ of said sections, claiming the same by virtue of his alleged preference right of entry, and by virtue of his settlement made on the last-named tract August 20, 1884, and his subsequent residence thereon. On the next day (April 3) McDonald made homestead application for the N.W. ¼ S.E. ¼ of said Sec. 30, claiming the same on the same grounds asserted by Hyde, viz., preference right of entry and settlement, residence and improvement.

On the day of the hearing (June 8, 1891) Hyde filed a petition to amend his homestead application of April 2, 1891, by omitting therefrom the N.E. ¼ S.W. ¼ of said Section 30, asserting, however, that he did not intend thereby to abandon his claim to that tract, but that he would at the proper time assert his claim thereto. His petition was allowed and the application amended as requested.

The hearing before the local office, which extended over a period of nine or ten months, resulted in the following decision by that tribunal; it rejected the claims of Hyde and McDonald, and Mauseau and Sullivan, and held that the lands were open to disposal under the public land laws from the date of the Secretary's decision, viz., February 18, 1889; that the applications of Alden and James were properly and legally presented February 19, 1889, and awarded to James the N.W. ¼ S.E. ¼ of said Sec. 30, the remaining tracts applied for by him having been inadvertently patented to Reed on his soldier's additional certificate, and hence taken out of the jurisdiction of the Land Department. To Alden was awarded lots 3, 5, and 6, excluding the other tract applied for, because it was not contiguous to the other tracts embraced in his application. To Wheeler was awarded the S.E. ¼ N.W. ¼ of said Section 30, upon the finding that his application was prior to that of Hartman.

Upon appeal, your office, by its decision of September 8, 1893, concurred in the decision of the local office in its rejection of the claims of McDonald and Hyde and Sullivan and Mauseau, but reversed it as to Alden and James, holding that said lands were not subject to disposal under the public land laws until the Secretary's decision, regularly communicated through the General Land Office, was received at the local office, or at most from the date of the promulgation of the Secretary's decision by the Commissioner of the General Land Office. Said decision then awarded to Wheeler, on the finding that his application was first in point of time on the morning of February 23, 1889, the S.E. ¼ N.W. ¼ and the N.W. ¼ S.E. ¼ of said Section 30, and held Hartman's three scrip locations for cancellation. As to lots 3, 5 and 6, embraced in the additional homestead application of Moyer, application to contest said entry had

been filed by one Billson and subsequently by one Monahan, alleging, in substance, that Moyer was dead on February 23, 1889. Your office letter "H" of March 13, 1891, *supra*, ordering a hearing, directed Billson and Monahan "to attend the hearing and present their testimony." Your office decision held that they failed to present any testimony, and that hence their applications to contest were still pending, subject to future consideration on the determination of this case. And it was further declared that should that decision become final, Moyer's entry would be made to cover the land originally applied for on February 23, 1889, as shown by his homestead application.

An appeal by the parties adversely affected by said decision brings the case to this department. Taking them in the order presented at the trial and in the arguments and briefs of counsel, the first requiring consideration are the claims of Hyde and McDonald.

At page 23 of their brief they declare that "they do not claim the land in controversy by virtue of any settlement or pre-emption rights," and at the bottom of page 24 of said brief they assert that "the question of these pre-emption rights is not in the case." Notwithstanding these statements, however, there is in the record (1) their homestead applications, containing, as stated, an express claim to these lands by virtue of settlement thereon August 20, 1884, and subsequent residence and improvement; (2) a great amount of testimony with reference to said settlement, residence and improvement, said settlement, etc., being the same on which they based their pre-emption right to said lands.

If there ever was a question to which the doctrine of *res adjudicata* applied it is that of the settlement and pre-emption rights of McDonald and Hyde to the lands embraced in Orille Stram controversy, a part of which is included in their homestead application of April 2 and 3, 1891.

There must of necessity be somewhere an end to controversy. Their settlement and pre-emption rights to these lands involved in the controversy concerning the Sioux Half-Breed scrip locations of Orille Stram were fully considered, and finally determined by the Department adversely to them in its decision February 18, 1889, *supra*, and in its review of that decision January 28, 1891 (12 L. D. 157), and the introduction into the record of this case of the evidence referred to cannot resurrect and revitalize that dead issue.

In your office letter "H" of March 13, 1891, directing a hearing, it was stated, with reference to Hyde and McDonald, that—

> Should they set up any claim as preferred contestants in regard to lots 5 and 6 and S.E. ¼ of N.W. ¼ and N.W. ¼ of S.E. ¼ of said section 30, you will allow them full opportunity at the hearing directed herein to present their testimony and to be heard with others.

This clearly limited the inquiry, so far as they were concerned, to their "claim as preferred contestants" as to their alleged preferred right to enter the lands described in said office letter "H." The local office so treated it, and in its decision denied them a preference right to enter said lands, holding, as stated, that they are not contestants under the act of May 14, 1880. Your office, on appeal, affirmed the decision of the local office in that respect, and their appeal here from your office decision brings before me for consideration, so far as they are concerned, that single question and none other.

To entitle them to a preference right of entry it must appear that their action against the Stram scrip locations was a contest under the act of May 14, 1880.

The proceedings against the Stram scrip locations were

separately instituted by Hyde and McDonald on October 9, 1884. At that time the lands were unsurveyed. The papers or pleadings by which the proceedings were begun are, with the exception of names and description, identical. After averring the invalidity of the scrip locations, each pleader proceeds in the exact language of the law to state his qualifications as a pre-emptor. He then states the date of his settlement on said land, that it was made with a view of inhabiting and cultivating it for his own exclusive use and benefit, and that as soon as the township plat was filed in the local office at Duluth, he intended to file his pre-emption declaratory statement for said land.

It will at once be seen that those pleadings asserted the superiority of the pre-emptor's title over that of the scrip locator, that it brought the two titles squarely in conflict, necessitating a judgment as to which was the better, and that the litigation following was a contest between conflicting claims. There is no intimation in the pleadings themselves that the proceedings are instituted under the act of May 14, 1880, and they certainly bear no resemblance whatever to the familiar affidavits of contest under that act. It is shown by the evidence in this case that on the trial of that case before the local office, a question as to who should pay the land-office fees arose, and that the suggestion was made that McDonald and Hyde, as the contestants, should pay the fees. Thereupon their attorney declared that the proceedings were not contests under the act of May 14, 1880, but contests between conflicting claims, and hence not within the rule requiring the contestant to pay all of the land-office fees, but that the fees should be apportioned between the parties, each paying their own fees, and that the matter was adjusted in that way.

Again, it is apparent that if those proceedings were in-

stituted by Hyde and McDonald for the purpose of securing a preference right of entry to the lands covered by the scrip locations, they would have exercised that right within thirty days from the date of notice of the decision of February 18, 1889. But, instead of that, they each filed a motion to review and reverse that opinion, and thereby assumed a position utterly inconsistent on the part of intelligent persons seeking a preference right to enter the lands involved in that controversy. Their every act has been that of persons consistently endeavoring to assert and establish their title under the pre-emption laws, and, incidentally, clear from the record the Orille Stram scrip locations, which were, in effect, a cloud on their pre-emption title.

The claim of a preference right to enter these lands as successful contestants evidently was an afterthought that came to them when casting about for some means by which to extricate themselves from the wreck in which the decision of February 18, 1889, involved them.

There is no theory presented by this case in any of its manifold aspects by or under which the status of Hyde and McDonald, in the controversy with Orille Stram *et al.*, could be construed to be that of contestants under the act of May 14, 1880. And the decision of your office, rejecting their applications to enter the lands embraced in their respective homestead applications and denying them a preference right to enter the same, as alleged successful contestants, is, in that respect, hereby affirmed.

* * * * * * *

The effect of the foregoing findings and conclusions is, to reject the claim of Thomas W. Hyde and Angus McDonald, of Daniel C. Sullivan and Carroll M. Mauseau, of Reuben E. Lawrence and William M. Stokes, of David Moyer and of Charles P. Wheeler, to any portion of the

premises in dispute. And to reject the applications of W. W. Billson and Thomas J. Monahan to contest Moyer's entry.

And the further effect of said findings and conclusions is, to award to William Alden lots 3, 5, and 6, of Sec. 30, T. 63 N., R. 11 W.; to Emil Hartman the S.E. ¼ of the N.W. ¼ of said Sec. 30, and to Houghton E. James the N.W. ¼ of the S.E. ¼ of said Sec. 30, T. 63 N., R. 11 W.

The outstanding, uncancelled patent, inadvertently issued to Thos. Reed, for lots 1 and 2, and the S.W. ¼ of the N.E. ¼ of said Sec. 30, deprived the Department of jurisdiction to extend the effect of this decision to those tracts.

Your office decision of September 8, 1893, is therefore modified as above stated.

APPENDIX No. 5.

Decision of Secretary Noble, of May 31, 1892, in Case of Hyde et al. v. Warren et al., 14 L. D., 576.

By your letter dated May 10, 1890, are transmitted the papers in the case of Thomas W. Hyde *et al. v.* James H. Warren, on the appeal of the former from the decision of your office dated October 16, 1889, sustaining the latter's location, allowed by the local office on October 15, 1885, R.R. No. 79, of lot 7, and the N.E. ¼ of S.W. ¼ of section 30, T. 63 N., R. 11 W., 4th P. M., Duluth, Minnesota, under the provision of the seventh clause of article two of the treaty of September 30, 1854 (not 1885 as stated in said decision), with the Chippewa Indians (10 Stat., 1110), and overruling the several applications to contest said location and enter the land covered thereby.

* * * * * *

It is alleged in the brief of counsel for Hyde, filed at the oral argument, that he applied on April 10, 1886, to contest said Warren's location on the ground that he had a prior pre-emption right to the land claimed by him; that you, on December 22, 1888, directed the local officers to order a hearing upon said application, and afterwards, to wit, on March 8, 1889, revoked said order without notice to him; that in July of the same year Hyde filed a motion to set aside said order of March 8, 1889, which motion has not yet been acted upon by you; that on February 23, 1889, he filed another application in the local office to obtain, under the pre-emption law, the said N.E. ¼ of the S.W. ¼, and also to be allowed to contest the said Warren location;

that on October 29, 1889, Hyde again made application to contest said Warren location and filed, in support thereof, his own and the affidavit of two other persons; that you, on October 16, 1889, held that the Warren location was valid and "utterly overlooked and ignored the claim of Hyde." It is further alleged in said brief that Hyde, as a successful contestant, on April 2, 1891, applied at the local land office to enter under the homestead laws three tracts of land in said section involved in the case of Hyde *et al. v.* Eaton *et al.*, (on review) 12 L. D., 157, upon which application a hearing was ordered before the local office and is still pending. It is quite evident that if said Warren scrip location be sustained, the claims of the other parties must fail, and the first question to be determined is, are the allegations of the contestants, or either of them, sufficient to require either a hearing to determine the validity of said Warren's location, or, upon the conceded facts, should the Chippewa scrip location be canceled and the land awarded to the first legal applicant? The Warren location having been presented to and allowed by the local officers, *prima facie* segregated the land covered thereby.

* * * * * *

From the record before me, I am satisfied that the contest affidavit of Hartman, having been first filed in the local office and sufficiently corroborated, must be held to take precedence of the other applications for contest. From his own showing, the contest application of Hyde, corroborated by the affidavits of Powers and McDonald, was not filed until October 29, 1889, long subsequently to the application of Hartman, Chandler and Barrick, and it appears that the hearing ordered upon his application of April 10, 1886, was revoked by you for the reason that the Department held in Hyde *et al. v.* Eaton *et al.*, on February 18, 1889, and affirmed on review (12 L. D., 157), that Hyde's pre-

emption claim for said tract was illegal. Besides, Hyde's motion to set aside said order was not made until July 6, 1889, and his application to contest, supported by affidavits, was not filed until October 29, 1889, and therefore cannot be considered until the prior contests shall have been decided. Durkee *v.* Teets (4 L. D., 99); Woodward *v.* Percival *et al.* (*idem*, 234); Conley *v.* Price (9 L. D., 490).

In addition to the foregoing it may also be observed that, according to his own showing, Hyde is now seeking to enter three other tracts under the homestead law. He cannot have two settlement claims for different tracts at the same time.

Upon a careful consideration of the whole matter, I conclude that the allegations set forth in Hartman's contest affidavit are sufficient to require a hearing to be had to afford him an opportunity to prove the same; that the other applications of contest must be held to await the result of said contest; that Hyde can claim nothing by virture of his pre-emption claim for said N.E. ¼ of S.W. ¼, as against the Government, because it has been decided by the Department that his said settlement claim was illegal, which decision was affirmed on review.

The decision of your office is therefore reversed, and you will direct a hearing to be ordered, in accordance with the rules of practice, upon Hartman's said allegations of contest.

APPENDIX No. 6.

Secretary Noble's decision of November 12, 1892, *in case of Hyde et al. v. Warren et al.*, 15 *L. D.* 415.

Motions for review of departmental decision of May 31, 1892 (14 L. D. 576), in the case of Thomas W. Hyde *et al. v.* James H. Warren *et al.*, involving lot 7 and the N.E. ¼ of the S.W. ¼ of Sec. 30, T. 63 N., R. 11 W., 4th P. M., Duluth, Minnesota, have been filed as follows: one in behalf of Jesse G. Barrick, one in behalf of Joseph H. Chandler, two in behalf of James H. Warren, and one in behalf of Thomas W. Hyde.

It seems unnecessary to set out at length the facts in the case, and reference is, therefore, made to the decision complained of, for those facts and the statement of the various claims to the land.

* * * * * * *

In the motion in behalf of Hyde the following assignment of errors is made:

1. Error in passing upon the rights of Hyde as a pre-emption claimant or otherwise, without giving him any hearing whatsoever in this case.
2. Error in holding that, as to James H. Warren and his scrip location, Hyde's right as a pre-emption claimant was *res adjudicata*.
3. Error in utterly disregarding Hyde's claim to the land in question.
4. Error in neglecting and refusing to give Mr. Hyde a hearing upon the merits of his claim in this case.
5. Error in holding that the Warren scrip location, or that the claims of any of the contestants, took priority of, or were superior to, the claim of Hyde to this land.

6. Error in utterly and entirely failing to give Hyde his day and hearing in court as against the Warren scrip.

7. Error in holding that what occurred in another case, and between different parties to the record, was *res adjudicata* as to the Warren claim in this case.

8. Error in holding that the fact that Hyde, as a successful contestant, had applied for a priority of entry to three other tracts cut him off or debarred him from asserting his rights in this case.

No argument has been presented in support of this motion. The right of Hyde as a pre-emption claimant, under the settlement upon which he bases his claim to this land, was involved in the case of Hyde *et al. v.* Eaton *et al.*, decided February 18, 1889 (not reported), and again, on motion for review, on January 28, 1891 (12 L. D., 157). It was there found that the settlement was not made in good faith for his own use and benefit, and that he therefore acquired no rights by virtue of that settlement. That decision disposed of his claim, not only as to the particular tracts of land involved in that case, but also as to all the tracts which he claimed under such settlement; that is, his claim as a whole was held to be invalid after a full investigation and opportunity to Hyde to be heard in defense thereof. This being the case, it was wholly unnecessary to again go over the same ground when some other person not a party to the former proceedings presented a claim to part of the land. It was not error to dispose of Hyde's pre-emption claim, as it was done in the decision complained of, by citing the former decision of the Department holding it invalid. His rights as a contestant were not definitely disposed of in the decision attacked by this motion, but consideration thereof was simply postponed until the prior contests could be decided. The motion for review presents no specific objection to this action, nor could any

objection thereto be sustained. For the reason given, the motion on behalf of Hyde is hereby denied.

* * * * * *

While these motions were each open to the objection that they presented no question of either law or fact that was not fully presented and considered when the decision complained of was rendered, and might very properly have been denied upon that ground alone, yet I have seen fit to take up and consider again the various points raised. After such examination and consideration, I find no good reason for revoking or changing that decision, and said motions are each hereby denied.

APPENDIX No. 7.

Decision of Secretary Smith of July 20, 1894, in case of Hartman v. Warren et al., 19 L. D., 64.

On the 21st of May, 1892, the Department directed a hearing in the case of Emil Hartman *v.* James H. Warren *et al.*, then entitled Hyde *et al. v.* Warren *et al.* (14 L. D., 576), (affirmed on review, in 15 L. D., 415), in these words:

Upon a careful consideration of the whole matter, I conclude that the allegations set forth in Hartman's contest affidavit are sufficient to require a hearing to be had to afford him an opportunity to prove the same; that the other applications of contest must be held to await the result of said contest; that Hyde can claim nothing by virtue of his pre-emption claim for said N.E. ¼ of the S.W. ¼ as against the Government, because it has been decided by the Department that his said settlement claim was illegal, which decision was affirmed on review.

The land involved in this controversy is lot 7, and the N.E. ¼ of the S.W. ¼ of Sec. 30, T. 63 N., R. 11 W., Duluth land district, Minnesota.

* * * * * *

A hearing was had, and much testimony taken. The Register and Receiver decided against the contestant, and recommended a dismissal of the contest and the patenting of Warren location. The contestant appealed. Your office confirmed the judgment of the local officers. The contestant now appeals to the Department.

I will briefly go over the facts of the case. It has been the subject of two appeals to the Department, and has been twice argued orally.

It now comes before the Department after all the facts have been brought out in the testimony, and fully elucidated by the arguments of counsel.

* * * * * * *

I am therefore of opinion that the decision of your office, affirming the action of the register and receiver in dismissing Hartman's contest, should be affirmed.

It appears that Thomas W. Hyde appeared at the hearing before the local officers, and sought to introduce testimony to establish a pre-emption claim to a part of the land in controversy, to wit, the N.E. ¼ of the S.W. ¼ of said Sec. 30. The register and receiver declined to receive the testimony offered, or to admit Hyde as a party to the hearing, which was affirmed by the decision of your office under consideration. Hyde appeals to the Department.

There must necessarily be somewhere a termination of all controversies. If there ever was a case before the Department to which the doctrine of *res adjudicata* is applicable, it is the case of Mr. Hyde. He has had no less than four hearings before the Department, on appeal or on review, and he now presents himself for the fifth time with a persistence which is worthy of admiration.

In Hyde *v.* Warren, on review (15 L. D. 415), it is said:

The right of Hyde as a pre-emption claimant under the settlement upon which he bases his claim to this land was involved in the case of Hyde *et al. v.* Eaton *et al.*, decided February 18, 1889 (not reported), and again, on motion for review, on January 28, 1891 (12 L. D. 157). It was there found that this settlement was not made in good faith for his own use and benefit, and that he therefore acquired no rights by virtue of that settlement. That decision disposed of his claim, not only as to the particular tracts of land involved in that case, but also as to all the tracts which he claimed under that settlement; that is, his claim as a whole was held to be invalid, after a full inves-

tigation and opportunity to Hyde to be heard in defense thereof. This being the case, it was wholly unnecessary to again go over the same ground, when some other person, not a party to the former proceedings, presented a claim to part of the land. It was not error to dispose of Hyde's pre-emption claim, as was done in the decision complained of, by citing the former decision of the Department, holding it invalid.

There was therefore no error in the decision of your office, in holding that the matter was *res adjudicata*.

The judgment of your office is approved and affirmed.

$\frac{1}{4}$ of section 30, township 63 north, range 11 west of the fourth principal meridian, and that it was the lessee of the remaining undivided $\frac{12}{25}$ of said land under a lease in writing from and executed by the owners in fee simple of said remaining undivided $\frac{12}{25}$, by the terms of which lease plaintiff was entitled to the immediate, sole and exclusive possession of said undivided $\frac{12}{25}$; that the defendant, the present plaintiff in error, on January 1, 1895, wrongfully and unlawfully entered into and took possession of said tract, and had ever since kept possession thereof. The prayer of the complainant was for possession, for costs and disbursements. The defendant answered and filed a cross petition, and on his application certain parties were made defendants to that cross petition. He subsequently filed an amended answer and cross petition.

In the latter these facts are alleged: That ever since August 20, 1884, the petitioner has been in the actual, open and exclusive possession of the tract in controversy; that at the time of his taking possession it was unoccupied and unsurveyed land of the United States; that prior to July 20, 1885, the lands in that district were duly surveyed and an approved plat thereof filed in the land office at Duluth, Minnesota, that being the land office of the district in which those lands are situated; that on July 20, 1885, he duly offered to the local land office and made application to file his declaratory statement for said tract and lots 5 and 6 and the S.E. $\frac{1}{4}$ of the N.W. $\frac{1}{4}$ of said section 30, and tendered the fees required by law to be paid on said application and filing; that he was informed by the local land officers that they would reject such application unless limited to the tract in controversy; that he then and there notified said local land officers that his house and the land he cultivated were upon and within said tract, and that he desired and intended to claim the same as a preëmption, whether or not he was successful in a contest which he had in reference to the other tracts in the application; that he was told by them that if he was a settler in good faith his rights would be protected; that on the same day, but without his knowledge, the register made this indorsement upon the application:

"Land Office, Duluth, Minn., July 20th, 1885. The within

application to file D.S. on the within described land is refused as to the S.E. ¼ of the N.W. ¼ and lots 5 and 6 of Sec. 30, T. 63, R. 11 W. for the reason that the date of settlement alleged herein does not antedate the unadjusted location of Sioux half breed scrip No. 19 E, in the name of Orille Moreau, filed for location June 16, 1883. Said unadjusted scrip location having withdrawn said land from settlement under the preëmption law subsequent to said date of filing of said scrip, to wit, June 16, 1883, you are allowed thirty days for appeal, and are advised that if you fail to do so within that time, this decision will be final."

That said officers retained said application, and also indorsed it as follows: "Filed Aug. 20, 1885;" that ignorant of this last indorsement, and within the proper time, after July 20, 1885, he formally appealed from the action of the local land office to the Commissioner of the General Land Office, which appeal was duly transmitted to that office on August 20, 1885; that thereafter, and on October 15, 1885, one Joseph H. Sharp, claiming to be the attorney in fact of James H. Warren, located the tract in controversy in the name of the said Warren, filing in support of said location certain Chippewa Indian scrip; that petitioner was ignorant of this location and filing until April 10, 1886, and then he made application in the local land office to contest said selection and location, and this application was also transmitted by the local land officers to the General Land Office at Washington.

The cross petition further alleged that on June 16, 1883, and before the surveys had been made of these lands, Orille Moreau, by her attorney in fact, located Sioux half breed scrip Nos. 19 D and 19 E on lands therein described by metes and bounds, which locations, after the surveys, were adjusted by the local land officers in the name of the locator, as follows: Scrip No. 19 D upon lots 3, 5 and 6 and the S.E. ¼ of the N.W. ¼ of said section 30, and No. 19 E upon lots 1 and 2 and the S.W. ¼ of the N.E. ¼ and the N.W. ¼ of the S.E. ¼ of said section 30; that on October 9, 1884, petitioner instituted a contest in the local land office against the said location of scrip No. 19 D, and on October 19, 1884, Angus McDonald a like contest against the

location of said scrip No. 19 E; that on the hearing of this latter contest the following testimony was received:

"*Testimony of S. F. White.*

"S. F. White, being duly sworn upon oath, deposes and says: I am one of the attorneys for the contestant; I have made careful search through my safe and among all my papers for the contract of security given me by the contestants in these cases to secure me for advances and legal services and I am unable to find it. I supposed until about two or three days before the day set for hearing that it was in the files of the case in my office, but I have looked through that and could not find it and have made a careful search through my safe and among all my papers where I thought it could be, and have continued that search at various times up to this morning when I made a last final search through my safe and have been unable to find it, and have no idea where it is."

"*Testimony of Mr. Hyde.*

"Q. Did you have any contract with Mr. White in writing or otherwise by which he was to receive any compensation or interest in the land?

"A. Yes, there was a contract.

"Q. Where is it?

"A. I don't know.

"Q. When and where did you see it last?

"A. I have not seen it since it was drawn by Mr. White.

"Q. What did it contain?

"A. It contained when I prove up on the land I was to secure him on a one half interest.

"Q. Who witnessed the contract?

"A. Powers, McDonald and myself and Mr. White were together; that is all I recollect. I can't say whether Powers witnessed it or not. The last I knew of the contract Mr. White had it. Mr. Powers was not included in the contract with McDonald and myself and White."

"*Mr. McDonald's Testimony.*

"Mr. White has furnished me the supplies to keep me on the

claim. I am making the improvements for myself. I don't know of any one being interested in the claim except myself. Judge White has no interest in it. There is an understanding that he is to have an interest in it if we succeed in this trial. He is to have a half interest. I know R. D. Mallett; he has no interest in the claim, he is not going to have any.

"The arrangement with Hyde is the same as mine. White is to have half if we succeed in this. James H. Powers is also to have an interest in it if we succeed. I don't know how much he is to get. I agreed to give him an interest if we succeeded in getting the land. Mr. Hyde went after Powers to come and testify in the case. I never had any talk with Mallett about the claim. Mr. White is paying the expenses of the claim with the understanding that he is to have a half of it if we secure it."

Redirect:

"Q. The half interest you speak of Mr. White is to have was to be a deed of or security upon a half of the land for advances and services?

"A. It was a security.

"Q. This interest you have spoken of as to Mr. Powers and which you say you cannot fix the amount of, what was that? Was it not simply that he was to be paid for his time and services and there was no telling how much he would have to put in it?

"He was to be paid for his time; that is all I mean by an interest he was to have."

Cross-examination:

"I am to let him have an interest in the land when I get it to pay him for his time and services. The contract I have with Mr. White for this one half is in writing.

"Q. When you get this land is it not the understanding between you and Mr. White that you are to deed him an undivided one half interest in it?

"A. No, sir; we never mentioned a deed.

"Q. What do you mean then by saying that White was to have a half interest?

"A. To secure him for advances.

"Q. Then if it was to secure him for advances made, how can you give him a half interest unless you deed him one half?

"A. I could not very well.

"Q. Then your understanding is you are to deed him one half interest in it?

"A. No; that is not my understanding.

"Q. Really you do not know anything about it, do you?

"A. I know my own transaction about it, but I don't know White's;"

that no further or other evidence was taken on either of said hearings relative to the said contract with the said White; and that by agreement this testimony offered in the McDonald case was to be considered in determining the validity of both locations, to wit, that of No. 19 D as well as that of No. 19 E. The cross petition then stated that such testimony was improperly admitted; that it was irrelevant, incompetent and immaterial because not bearing upon the question of the validity of these scrip locations; that the local land officers upon the termination of the hearing found the scrip locations valid, and both the petitioner and McDonald appealed therefrom to the Commissioner of the General Land Office; that the Commissioner reversed the decision of the local land officers and held the scrip locations invalid, and from his decision an appeal was taken by the locator to the Secretary of the Interior, who, on February 18, 1889, affirmed the decision of the Commissioner of the General Land Office, but erroneously and contrary to law held that said lands were open to entry by the first legal applicant. The cross petition then proceeded to show that for five succeeding years proceedings were continued in the land department at Washington and before the local land office at Duluth, in which repeated hearings and contests were had in reference to the validity of these scrip locations, and also of the location made by Warren of Chippewa scrip on the tract in controversy, the outcome of which was a final decision that Warren's application to enter this land with the Chippewa Indian scrip was valid and entitled to priority, and on the strength of that a patent was issued to him, and from him the plaintiff obtained its title.

Demurrers were interposed to the amended cross petition, which were sustained. On appeal to the Supreme Court of the State this ruling on the demurrers was on July 24, 1896, affirmed. 66 Minnesota, 24. Thereafter, in the district court, a reply was filed to the amended answer. The case came on for hearing on pleadings and proofs at the November term, 1896. Findings of fact and conclusions of law were made by the trial court and judgment entered for the plaintiff, which judgment was, thereafter, on April 22, 1898, affirmed by the Supreme Court, 72 Minnesota, 16, to reverse which judgment this writ of error was sued out.

Mr. John Brennan and *Mr. Louis A. Pradt* for plaintiff in error. *Mr. Arthur L. Sanborn* and *Mr. Louis K. Luse* were on their brief.

Mr. James K. Redington for defendants in error. *Mr. Frank B. Kellogg* and *Mr. J. H. Chandler* were on his brief.

Mr. Justice Brewer, after stating the facts, delivered the opinion of the court.

The testimony is not preserved in the record and no question can arise upon the findings of fact, for they are simply to the effect that the plaintiff had the legal title to an undivided $\frac{1}{2}\frac{3}{5}$ and the leasehold right from the legal holders of the remaining $\frac{1}{2}\frac{3}{5}$, and that the defendant was in possession without any color of title or right to the lands, so that the only questions which can be considered are those which arise upon the demurrers to the amended cross petition.

Upon the facts disclosed in that cross petition we remark that as the contest in reference to this tract was pending before the land department for nine years and carried on with exceeding vigor, as shown by the record of the frequent motions, applications and so forth on the part of the respective parties, it would seem impossible to believe that the department was not fully advised of the facts respecting the locations and entries. We are not called upon to determine

whether every step in this protracted controversy was carried on with technical accuracy in the matter of procedure, and it may be, as counsel contend, that upon some of the motions and in some of the contests testimony was received which was not pertinent to that particular phase of the controversy, but it is quite evident that in one form or another, on some motion or another, in some stage of the proceedings, all the facts and claims of either party were fully presented, considered and determined by the department. This is not a case on error, in which the regularity of every step taken in the land department is to be considered and determined and upon that inquiry judgment entered, affirming or reversing its decision, but it is an independent suit in the courts in which the inquiry is whether the parties to the proceedings in the land department had full and proper notice of those proceedings, whether the department heard the claims and evidence offered by each party, and then whether upon the facts as found by it there was any error in matter of law in its decision. It may be remarked in passing that there is no allegation of corruption or perjury, or any of the grounds upon which sometimes a court of equity will set aside the conclusion of another tribunal even where the proceedings are regular in form. And as it is evident from the showing made in the cross petition that both parties were often and fully heard and no limitation placed upon their right to offer testimony, we must accept as conclusive the findings of fact made by the department, and inquire simply whether the law was properly adjudged.

Coming now to the merits of the controversy, the defendant, the cross petitioner, made a single application to enter 160 acres, one quarter of which is the tract in controversy. There were not two separate applications, one to enter the 40 and another the remaining 120 acres, and it cannot now be treated as though there were two. If the applicant was guilty of any violation of law such violation vitiated the proceeding *in toto*. This is not like *Cornelius* v. *Kessel*, 128 U. S. 457, in which an entry of two tracts was sought, one of which was not at the disposal of the United States by reason of its being within a swamp land grant to the State, and it was held that the validity of the

entry as to the other was not affected thereby. In that case there was no wrong on the part of the entryman. He had acted in good faith, had not attempted any fraud, or to do anything in disregard of the mandates of the statutes, either in letter or spirit, and obviously the land department erred in cancelling the entire entry by reason of its covering land not subject to disposal. Here there was a distinct violation of law on the part of the entryman, and one which vitiated the application as a whole. The Revised Statutes, sec. 2262 require a preëmption applicant to make affidavit "that he has not directly or indirectly made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself," and also provide that "if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same." It was this statute which the land department found the applicant had violated, in that he was seeking to enter a portion of the land, not solely for his own benefit, but also in part for the benefit of others. It would be a gross perversion of the spirit of this statute to permit a party who has made a single application to enter a tract of land to ignore its unity after it has been proved that he has made a contract in defiance of the statute in reference to half the land, and have it divided into two separate and independent applications, and then his application sustained and his title confirmed as to that part of the land in respect to which he had made no contract. Such a construction would enable an applicant without any risk to speculate on the chances of escaping detection in his effort to violate the statute and thwart the purposes of Congress in the disposal of public lands.

No one can read the testimony which was offered before the land officers without perceiving that there was sufficient in it to justify a finding that the applicant had made a contract in direct violation of the statutory provisions. It is true he himself testified that he was to secure Mr. White "on a one half interest," but the contract itself was not produced, having in some way disappeared, and McDonald, who was a party to it

(for it was a joint contract between White, the applicant, and McDonald,) testified that Mr. White, paying expenses, did so under an agreement that he was to have half of the land. We do not stop to inquire whether an agreement to give a mortgage for money advanced comes within the letter or spirit of the statute, for there was enough in the testimony to justify the conclusion of the department that it was a contract to divide the land when obtained, and it is not the province of the courts to review such finding of fact.

These are the only questions which we deem of importance, and finding no error in the record the judgment of the Supreme Court of Minnesota is

Affirmed.

HYDE *v.* BISHOP IRON COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 126. Argued January 29, 30, 1900. — Decided April 9, 1900.

On the evidence set forth in the statement of facts and in the opinion of the court, it is *held*, that there was on the part of the entryman a distinct violation of section 2262 of the Revised Statutes, with regard to contracts by which the tract for which he applies is not to inure to another's benefit, and the adverse judgment of the court below is sustained.

On April 3, 1895, the Bishop Iron Company, one of the defendants in error, filed in the District Court of the Eleventh Judicial District of Minnesota, in and for the county of St. Louis, its complaint in ejectment, alleging that it was the absolute owner in fee simple and entitled to the immediate possession of the undivided $\frac{1}{2}\frac{3}{5}$ of the following described land, situate in the county of St. Louis, to wit: The N.E. $\frac{1}{4}$ of the S.W.